

United States
//
Circuit Court of Appeals

For the Ninth Circuit.

THE BANK OF ITALY, a Corporation,
Plaintiff in Error,
vs.

F. ROMEO & CO., INC., a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

FILED
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F. D. MONCKTON,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

LOUIS FERRARI, Esq., Bank of Italy Bldg., San
Francisco, Calif.,

Attorney for Plaintiff.

Messrs. CUSHING & CUSHING, First National
Bank Bldg., San Francisco, Calif.,

Attorneys for Defendant.

In the Superior Court of the State of California, in
and for the City and County of San Francisco.

THE BANK OF ITALY, a Corporation,

Plaintiff,

vs.

F. ROMEO & CO., INC., and F. ROMEO,

Defendants.

Complaint.

The plaintiff complains of the defendants and for
cause of action alleges:

I.

That the plaintiff is, and at all the times herein
mentioned was, a corporation duly organized and
existing under and by virtue of the laws of the State
of California.

II.

That the defendants, F. Romeo & Co., is, and at all
the times herein mentioned was, a corporation, or-
ganized and existing under and by virtue of the
State of New York.

III.

That on the 2d day of May, 1919, the said de-

defendants F. Romeo & Co., were doing business in the State of California, to wit, purchasing olives and other merchandise in the State of California.

IV.

That on the 2d day of May, 1919, the said defendants, in consideration of the discount by the Bank of Italy of a certain draft dated May 2d, 1919, payable to the order of F. A. Mennillo, and drawn on F. Romeo & Co., Inc., for the sum of Five Thousand Seven Hundred Forty-three (5743.63) and 63/100 Dollars, promised and agreed to pay said draft upon maturity. [1*]

V.

That the said draft is in the words and figures following to wit:

"BANK OF ITALY.

Los Angeles, Cal., May 2, 1919. \$5743.63

At sixty days sight pay to the order of F. A. Mennillo, FIFTY-SEVEN HUNDRED FORTY THREE & 63/100 DOLLARS, Value received and charge the same to the account of

To F. ROMEO & CO., Inc., 374 Washington St.,
New York City, N. Y.

(Signed) F. A. MENNILLO,

By (Signed) C. R. MENNILLO,

Atty.-in-facts."

VI.

That said draft represented a part of the purchase price for certain olives which were shipped on the said 2d day of May, 1919, by said F. A. Mennillo

*Page-number appearing at foot of page of original certified Transcript of Record.

to the said defendants. That the said shipment of olives arrived in New York prior to the maturity of the draft hereinabove set forth and the said defendants accepted the said olives, and still have the same in their possession and have never returned or offered to return the same to the said F. A. Mennillo.

VII.

That on the said 2d day of May, 1919, the said F. A. Mennillo duly endorsed and transferred said draft to the plaintiff, the Bank of Italy, for the sum of Five Thousand Seven Hundred Forty-three and $63/100$ (\$5743.63) Dollars, and said Bank of Italy has ever since and now is the true and lawful owner thereof.

VIII.

That the said draft was duly presented to said F. Romeo & Co., Inc., at 374 Washington Street, New York City, New York, on the 1st day of July, 1919, and the said defendants, and each of them, refused to pay the same and still refuse to pay [2] the same.

That the said draft has not been paid nor has any part thereof been paid and that the face thereof, to wit, the sum of Five Thousand Seven Hundred Forty-three and $63/100$ (\$5743.63) Dollars, together with interest thereon from July 2d, 1919, at the rate of seven per cent (7%) per annum, is now due and payable.

WHEREFORE, plaintiff prays judgment against said defendants in the sum of Five Thousand Seven

Hundred Forty-three and 63/100 (\$5743.63) Dollars, with interest and cost of suit.

LOUIS FERRARI,
Attorney for Plaintiff.

State of California,
City and County of San Francisco,—ss.

James A. Bacigalupi, being first duly sworn, deposes and says:

That the Bank of Italy is a corporation duly organized and existing under and by virtue of the laws of the State of California; that he is an officer, to wit, the Vice-President of said Bank of Italy.

That he has read the foregoing complaint, and that he knows the contents thereof, and that the same is true of his own knowledge, except as those matters therein stated on information and belief, and as to those matters that he believes it to be true.

JAMES A. BACIGALUPI,
Vice-president, Bank of Italy.

Subscribed and sworn to before me this 24th day of May, A. D. 1920.

[Seal] THOMAS S. BURNES,
Notary Public in and for the City and County of
San Francisco, State of California. [3]

[Endorsed]: Assigned to Dept. No. 1, May 25, 1920. Bernard J. Flood, Presiding Judge.

[Endorsed]: Filed May 24, 1920. H. I. Mulcrevy, Clerk. By J. F. Dunworth, Deputy Clerk.
[4]

In the Superior Court of the State of California, in
and for the City and County of San Francisco.

No. 106,972.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC., and F. ROMEO,
Defendants.

Answer to Complaint.

Now come the defendants F. Romeo & Co., Inc., a corporation, and F. Romeo, and answering the complaint of plaintiff herein deny and allege as follows:

I.

Deny that on the 2d day of May, 1919, or at any time in said complaint mentioned, the said defendants, or either of them, were doing business in the State of California, to wit, purchasing olives and other merchandise, or olives or other merchandise, in the State of California, or were purchasing olives and other merchandise, or olives or other merchandise, in the State of California, or were doing business in the State of California.

II.

Deny that on the 2d day of May, 1919, or at any time, or otherwise, or at all, the said defendants, or either of them, in consideration of the discount by The Bank of Italy, or by anyone, of a certain or any draft dated May 2, 1919, or otherwise dated, payable to the order of F. A. Mennillo, or of anyone, drawn

on F. Romeo & Co., Inc., or upon anyone, for the sum of Five Thousand Seven Hundred Forty-three and $63/100$ (\$5743.63) Dollars, or any sum, or in consideration of the discount by The Bank of Italy, or by anyone, of the draft set forth in paragraph V of said complaint, or of any draft, or [5] otherwise or at all, promised and agreed, or promised or agreed, to pay upon maturity said alleged draft referred to in paragraph IV of said complaint, or the draft set forth in paragraph V of said complaint, or any draft; and in this behalf defendants allege that on or about the 2d day of May, 1919, defendant F. Romeo & Co., Inc., paid to one F. A. Mennillo on account of the purchase price of certain preserved olives for human consumption theretofore purchased or agreed to be purchased from said F. A. Mennillo by said defendant F. Romeo & Co., Inc., the sum of Eight Thousand (\$8,000) Dollars, and orally promised said F. A. Mennillo that if said olives, which had theretofore been shipped by said F. A. Mennillo to the City of New York in the State of New York, should, upon examination by defendant F. Romeo & Co., Inc., at the warehouse of defendant F. Romeo & Co., Inc., at the said City of New York, prove to be of good quality and condition, as provided in the contract of purchase of said olives theretofore entered into between said F. Romeo & Co., Inc., and said F. A. Mennillo, and as represented and warranted by said F. A. Mennillo, defendant F. Romeo & Co., Inc., would accept a draft for the sum of Five Thousand Seven Hundred and Forty-three and $63/100$ (\$5743.63) Dollars

drawn by said F. A. Mennillo upon said F. Romeo & Co., Inc., at 374 Washington Street, New York City, N. Y., payable at sixty (60) days sight to the order of F. A. Mennillo, but that said olives upon arrival in New York were examined by defendant F. Romeo & Co., Inc., and found to be and were not of good quality and condition as required by said contract of purchase, but were spoiled and unfit for human consumption, and defendant F. Romeo & Co., Inc., therefore and thereupon refused to accept said olives and immediately notified said F. A. Mennillo and [6] plaintiff that said olives were not of good quality and condition as required by said contract of purchase, but were spoiled and unfit for human consumption and said defendant F. Romeo & Co., Inc., therefore and thereupon refused to accept said draft.

III.

Deny that the alleged draft mentioned in said complaint represented a part of the purchase price for certain or any olives which were shipped on said 2d day of May, 1919, by said F. A. Mennillo to the said defendants, or either of them, and deny that certain or any olives were shipped on the said 2d day of May, 1919, or at any time mentioned in said complaint, by said F. A. Mennillo to the said defendants, or either of them. Deny that the alleged shipment of olives mentioned in said complaint arrived in New York prior to the maturity of the draft in said complaint mentioned, or prior to the maturity of any draft, and deny that any shipment of olives was made by defendants as alleged in said

complaint, and deny that any shipment of olives mentioned in said complaint arrived in New York at any time, or at all, and deny that the said defendants, or either of them, accepted the alleged olives mentioned in said complaint and still, or still, have the same in their possession, or in the possession of either of them, and have or have never returned or offered to return the same to the said F. A. Mennillo.

IV.

As to the allegations contained in paragraph VII of said complaint defendants allege that they have no information or belief sufficient to enable them to answer the same, and basing their denial upon that ground deny that on the said 2d day of May, 1919, or at any time, or at all, the said F. A. Mennillo duly, or at all, endorsed and transferred, or [7] endorsed or transferred, the alleged draft mentioned in said complaint of the plaintiff The Bank of Italy for the sum of Five Thousand Seven Hundred and Forty-three and 63/100 (\$5743.63) Dollars, or for any sum, or otherwise or at all, and deny that said The Bank of Italy has ever since, or at all, and now is, or now is, the true and lawful, or true or lawful, or any owner thereof.

V.

Deny that the said alleged draft in said complaint mentioned was duly or at all presented to said F. Romeo & Co., Inc., at 374 Washington Street, New York City, N. Y., or elsewhere, or at all, on the first day of July, 1919.

VI.

Deny that the sum of Five Thousand Seven Hundred Forty-three and 63/100 (\$5743.63) Dollars, together with interest thereon from July 2, 1919, at the rate of seven (7%) per cent per annum, or at any rate, or together with any interest, or at all, or any part thereof, is now, or ever has been, due and payable, or due or payable.

As a separate defense to the alleged cause of action in said complaint set forth defendants allege:

That the alleged draft set forth in said complaint was drawn by said F. A. Mennillo upon said defendant F. Romeo & Co., Inc., as a part of the following transaction, and not otherwise, to wit:

Prior to the 2d day of May, 1919, defendant F. Romeo & Co., Inc., entered into a contract with the said F. A. Mennillo for the purchase of a large quantity of preserved olives for human consumption and of good quality and condition to be shipped by said F. A. Mennillo to defendant F. Romeo & Co., Inc., from a common shipping point in the State of California to defendant F. Romeo & Co., Inc., at the City of New York, State of New York, [8] but only after examination and approval of said olives or representative samples thereof by the defendant F. Romeo & Co., Inc., or its duly authorized representative, before said olives should be shipped; that thereafter, to wit, during the month of April, 1919, said F. A. Mennillo shipped two carloads of olives of the alleged value of Thirteen Thousand Seven Hundred Forty-three and 63/100 (\$13,743.63) Dollars from said shipping point in the

State of California to defendant F. Romeo & Co., Inc., at the City of New York, in the state of New York, without first advising said F. Romeo & Co., Inc., and without giving defendant F. Romeo & Co., Inc., or any representative thereof, an opportunity to examine said olives or any sample thereof before such shipment, and without any examination or approval before such shipment by defendant F. Romeo & Co., Inc., or by any representative thereof; that after such shipment and prior to said 2d day of May, 1919, said F. T. Mennillo informed defendant F. Romeo & Co., Inc., that he had made such shipment and asked defendant F. Romeo & Co., Inc., to pay the sum of Thirteen Thousand Seven Hundred Forty-three and 63/100 (\$13,743.63) Dollars for said olives so shipped as aforesaid; that defendant F. Romeo & Co., Inc., refused to pay said or any sum for same because of said shipment without such examination and approval, but thereafter upon the representation and warranty which he made to defendant F. Romeo & Co., Inc., that said olives so shipped were of good quality and condition, and fit for human consumption, orally and not otherwise agreed with said F. A. Mennillo that if said F. A. Mennillo would deliver to defendant F. Romeo & Co., Inc., the bills of lading that had been issued by the carrier upon the shipment of said olives, as hereinbefore in this paragraph stated, defendant F. Romeo & Co., Inc., would advance [9] to said F. A. Mennillo on account of the purchase price of said olives so shipped as hereinbefore in this paragraph stated, the sum of Eight Thousand

(\$8,000) Dollars, and that if said olives so shipped as hereinbefore in this paragraph stated, should, upon examination by said F. Romeo & Co., Inc., at its warehouse in said City of New York, prove to be of good quality and condition and fit for human consumption as provided in said contract of purchase and as represented and warranted by said F. A. Mennillo as aforesaid, defendant F. Romeo & Co., Inc., would accept a draft to be drawn at sixty (60) days' sight by said F. A. Mennillo upon said F. Romeo & Co., Inc., at New York City, in the State of New York, to the order of said F. A. Mennillo for the balance of the alleged value and price of said olives so shipped as aforesaid, to wit, the sum of Five Thousand Seven Hundred Forty-three and 63/100 (\$5743.63) Dollars; that pursuant to said oral agreement defendant F. Romeo & Co., Inc., on the 2d day of May, 1919, paid said sum of Eight Thousand (\$8,000) Dollars to said F. A. Mennillo and received from him said bills of lading; and pursuant to said oral agreement and not otherwise said F. A. Mennillo drew the alleged draft set forth in paragraph V of said complaint; that all of the facts in this paragraph hereinbefore stated were well known to plaintiff prior to and at the date of said alleged draft and the time when same was drawn and prior to and at the endorsement, delivery or assignment of said alleged draft to plaintiff, if any; that contrary to the provisions of said contract of purchase and contrary to the warranties and representations of said F. A. Mennillo, as aforesaid, said olives so shipped as hereinbefore in this

paragraph stated were not of good quality and condition but were spoiled and not fit for human consumption; that immediately upon the arrival at said City of New York of said [10] olives so shipped as hereinbefore in this separate defense stated, defendant F. Romeo & Co., Inc. removed said olives to the warehouse of defendant F. Romeo & Co., Inc., in said City of New York and examined the same and then found for the first time that said olives were not of good quality and condition as required by the provisions of said contract of purchase and as warranted and represented by said F. A. Mennillo as aforesaid but were spoiled and not fit for human consumption, and defendant F. Romeo & Co., Inc., thereupon notified said F. A. Mennillo and plaintiff that said olives were not of good quality and condition as aforesaid but were spoiled and not fit for human consumption and that defendant F. Romeo & Co., Inc., would therefore not accept or pay said draft and offered to return said olives to said F. A. Mennillo; that said F. A. Mennillo refused to receive the same; that because said olives were not of good quality and condition as required by the provisions of said contract of purchase and as represented and warranted by said F. A. Mennillo, as aforesaid, said olives were worthless to defendant F. Romeo & Co., Inc., and were of no value, whereby defendant F. Romeo & Co., Inc., was damaged in the sum of Fourteen Thousand (\$14,000) Dollars, of which neither the whole nor any part has been paid to defendant F. Romeo & Co., Inc.; that the facts hereinbefore in this paragraph stated constitute a setoff

or defense against any claim or cause of action that said F. A. Mennillo ever had, or claimed to have, or has, or claims to have, against defendant F. Romeo & Co., Inc., in respect of the alleged draft referred to in said complaint, or any alleged promise or agreement relating to said alleged draft, and said setoff or defense existed at the time of the assignment, endorsement or delivery of said alleged draft to plaintiff, if any; that by reason of the facts hereinbefore in this paragraph stated said F. A. Mennillo is, and was at the time of the assignment, [11] endorsement or delivery of said alleged draft to plaintiff, if any, indebted to defendant F. Romeo & Co., Inc. in said sum of Fourteen Thousand (\$14,000) Dollars, of which neither the whole nor any part has been paid, and which sum defendants pray be set off against the alleged claim or cause of action of plaintiff against defendant F. Romeo & Co., Inc., in said complaint set forth.

WHEREFORE, defendants pray that plaintiff take nothing by its complaint herein and that defendants go hence with their costs.

CUSHING & CUSHING,
Attorneys for Defendants.

State of California,
City and County of San Francisco,—ss.

F. Romeo, being first duly sworn, deposes and says:

I am one of the defendants in the above-entitled action, and I am an officer, to wit, the President of F. Romeo & Co., Inc., a corporation, which is one

of the defendants in said action. I have read the foregoing answer to complaint and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated on information or belief and as to those matters I believe it to be true.

F. ROMERO.

Subscribed and sworn to before me this 9th day of July, 1920.

[Seal] H. B. DENSON,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Jul. 9, 1920. H. I. Mulcrevy,
Clerk. By H. Bunner, Deputy Clerk. [12]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 16,417.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC.,
Defendant.

Verdict.

We, the Jury, find in favor of the defendant, F. Romeo & Co., Inc.

J. A. McNEAR,
Foreman.

[Endorsed]: Filed June 21, 1921. Walter B. Maling, Clerk. [13]

(Title of Court and Cause.)

Judgment on Verdict.

This cause having come on regularly for trial upon the 17th day of June, 1921, being a day in the March, 1921, term of said Court, before the Court and a jury of twelve men duly impaneled and sworn to try the issue joined herein, Louis Ferrari, Esq., appearing as attorney for plaintiff and W. H. Gor-rill and Delger Trowbridge, Esqrs., appearing as at-torneys for defendants; and the trial having been proceeded with on the 20th and 21st days of June, in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed and the cause, after argu-ments by the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the jury, find in favor of the defendant F. Romeo & Co., Inc. J. A. McNear, Foreman"; and the Court having ordered that judgment be entered in accord-ance with said verdict and for costs:

Now, therefore, by virtue of the law and by rea-son of the premises aforesaid, it is considered by the Court that The Bank of Italy, a corporation, plaintiff, take nothing by this action and that said defendants go hereof without day, and that said de-fendants do have and recover of and from said

plaintiff their costs herein expended taxed at \$262.40.

Judgment entered June 21, 1921.

WALTER B. MALING,

Clerk. [14]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 16,417.

THE BANK OF ITALY, a Corporation,

Plaintiff,

vs.

F. ROMEO & CO., INC., and F. ROMEO,

Defendants.

Petition for an Order Granting a New Trial.

To the Honorable, the District Court of the United States, the Southern Division, for the Northern District of California, Second Division:

Comes now the Bank of Italy, plaintiff in the above-entitled action, and petitions the above-entitled Court for a new trial upon the following grounds, to wit:

I.

Irregularity in the proceedings of the Court and orders of the Court, and abusive discretion by which the said plaintiff was prevented from having a fair trial.

II.

Insufficiency of evidence in this: that said evi-

dence showed, without conflict, that all of the allegations of the complaint were true and that said defendant, F. Romeo & Co., through its President, Mr. F. Romeo, for a valuable consideration, unconditionally promised and agreed to accept the draft set forth in the complaint of plaintiff upon the arrival of the goods in question [15] in New York, and that said draft was duly presented and payment refused, and that thereby the said plaintiff suffered damage in the sum of \$5,743.63, with interest, and that said sum has not been paid either by F. Romeo & Co. or by Mr. F. A. Mennillo; and further, that said evidence without contradiction supported all of the allegations contained in the complaint of said plaintiff and that no evidence was offered or received which in any way sustained any of the allegations of the answer of the defendant F. Romeo & Co.; that said evidence was further insufficient to justify verdict in favor of defendant for the reason that even if it were conceded that any evidence was offered supporting the claim of the defendant that the promise to accept and pay said draft was conditional upon the arrival of the goods in New York in a satisfactory condition, even in that contingency the acceptance, retention and sale of the goods by said defendant was sufficient to warrant a verdict in favor of plaintiff, and was not sufficient to establish the defense claimed by defendant.

III.

That the said verdict is against law for all the reasons set forth in the last subdivision.

IV.

Errors in law occurring at the trial as follows in this: that the District Court erred in the following rulings made by it on the trial of said action.

(a) Error of said Court in its ruling on evidence.

1. In sustaining defendants' objection to the following question propounded by plaintiff to the witness P. W. Lacy. Question: "When you say that he stated he would accept the draft when the goods arrived, did you use the word 'accept' in the same sense as 'honor' is used?"

EXCEPTION NUMBER 1. [16]

2. In overruling plaintiff's objection to the offer in evidence of Defendants' Exhibit "A," said objection being made on the ground that no foundation had been laid in this: that it does not appear that this contract was called to the attention of the Bank of Italy or that the Bank of Italy was in any way bound by this contract.

EXCEPTION NUMBER 2.

3. In overruling plaintiff's objection to the testimony of the witness Francisco Romeo to a conversation which transpired between Mr. Mennillo and defendant herein before they went to the bank, and in the presence of no representative of the bank; said objection was made on the ground that the conversation took place between the defendant and Mr. Mennillo before they went to the bank and on the ground that it would not be binding on the plaintiff in this action, the Bank of Italy, it having taken place outside of the presence of any of its representatives.

EXCEPTION NUMBER 3.

4. In overruling plaintiff's objection to the testimony of the witness, Francisco Romeo, to a conversation between the defendant and Mr. Mennillo; said objection was based upon the ground that it varied the terms of a written contract already offered in evidence.

EXCEPTION NUMBER 4.

5. In overruling plaintiff's objection to the question propounded by defendant to the witness Francisco Romeo. Question: "What were the instructions that you got from your firm?" Said objection was made on the ground that it was immaterial, irrelevant and incompetent, and that the witness had already testified that this transaction was authorized by the firm.

EXCEPTION NUMBER 5.

6. In sustaining defendants' objection on the ground that it was argumentative to the following question propounded [17] by plaintiff to the witness Francisco Romeo to the following question. Question: "You say that Mr. Moore would not have cashed this draft otherwise. You do not think that it would have been good banking practice for him to have cashed it if he knew that the payment was conditioned on the arrival of the goods?"

EXCEPTION NUMBER 6.

7. In overruling plaintiff's objection to the admissibility of Defendants' Exhibit "B"; said objection being made on the ground that said letter from Mr. Romeo to his firm was a self-serving declaration.

EXCEPTION NUMBER 7.

8. In overruling plaintiff's objection to the admissibility of Defendants' Exhibit "C" (a telegram from F. Romeo to F. Romeo & Co.); said objection being based on the ground that the said telegram was a self-serving declaration.

EXCEPTION NUMBER 8.

9. In overruling plaintiff's objection to the admissibility of Defendants' Exhibits "D" and "E" (copies of bills of lading); said objection being made on the ground that they are immaterial, irrelevant and incompetent in so far as the plaintiff, the Bank of Italy, is concerned.

EXCEPTION NUMBER 9.

10. In overruling plaintiffs objection to the question propounded by defendant to the witness W. O. Johnson. Question: "Was there a carload of olives shipped from Lindsay on May 9th to F. Romeo & Co. by F. A. Mennillo?" said objection being based on the ground that it is absolutely immaterial, irrelevant and incompetent and not within the issues of the case as to what may have happened on May 9th.

EXCEPTION NUMBER 10.

11. In overruling plaintiff's objection to the question propounded by counsel for defendant to the witness W. O. Johnson. Question: "If when olives are supposed to be ready to ship, when they are received by purchaser they are reddish yellow, are they [18] in good condition?" said objection being made on the ground that there was no evidence that these olives were yellow.

EXCEPTION NUMBER 11.

12. In overruling plaintiff's objection to the question propounded by defense to witness, Mrs. Marie J. Romeo, to a conversation at the Clark Hotel, Los Angeles, at which there was present no member of the Bank of Italy. Question: "What was the conversation, as well as you can remember it?" the objection of counsel for plaintiff being on the ground that the conversation took place between the defendant and Mr. Mennillo before they went to the bank, and on the ground that it would not be binding on the plaintiff in this case, the Bank of Italy, it having taken place outside of the presence of any representative of the Bank of Italy.

EXCEPTION NUMBER 12.

(b) Error of said Court in instructing the jury as follows:

1. That the said Court erred in instructing the jury in regard to the probability or improbability of the plaintiff herein accepting an oral promise of acceptance in that the Court thereby intimated to the jury that the oral agreement was to be viewed with suspicion, and that said instruction is contrary to both the law and the fact.

EXCEPTION NUMBER 13.

2. That the Court erred in instructing the jury that it was not definitely shown whether or not the bank actually paid out \$5000.00, or any other amount, to F. A. Mennillo & Co. in this: that said instruction was contrary to both the law and the fact and contrary to the undisputed fact as estab-

lished in the testimony of F. A. Mennillo by deposition and in the testimony of C. R. Mennillo.

EXCEPTION NUMBER 14.

3. That the said Court erred in instructing the jury with regard to the manner in which the defendant should have [19] disposed of the olives upon their arrival, and in instructing them that unless they find that the olives were up to the contract standards or that notwithstanding their defects, the defendant accepted them and waived the defects, their verdict must be for the defendant, said instructions being contrary to both the law and the fact of this case.

EXCEPTION NUMBER 15.

(c) Error of the Court in failing to give to the jury instructions requested by the plaintiff.

This petition will be heard upon the pleadings and papers on file and upon the minutes of the Court, which said minutes shall include the clerk's minutes and all notes and memorandums which may have been kept by the Judge of said court, and also the reporter's transcript of his shorthand notes, together with the charge of the Court to the jury.

WHEREFORE, the said petitioner prays that the verdict of said jury be set aside and that a new trial be granted in the above-entitled action.

BANK OF ITALY, a Corporation.

By JAMES A. BACIGALUPI,

Vice-President,

Petitioner.

LOUIS FERRARI,

Attorney for Petitioner. [20]

Due service and receipt of a copy of the within petition is hereby acknowledged this 1st day of July, 1921.

CUSHING & CUSHING,
Attorneys for Defendants.

[Endorsed]: Filed Jul. 1, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [21]

At a stated term, to wit, the July term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 12th day of September, in the year of our Lord one thousand nine hundred and twenty-one.

No. 16,417.

BANK OF ITALY

vs.

F. ROMEO & CO., INC., et al.

Order Denying Petition for New Trial.

Ordered that the memorandum opinion of Judge Dietrich on plaintiff's petition for new trial be filed and that in accordance with said opinion the petition for new trial be and the same is hereby denied.

[22]

(Title of Court and Cause.)

Memorandum Opinion Denying Petition for New Trial.

Sept. 10, 1921.

LOUIS FERRARI, Attorney for Plaintiff.

WM. H. GORRILL and DELGER TROWBRIDGE, Attorneys for Dēfendants.

DIETRICH, District Judge:

At the time of the trial I entertained and I still entertain grave doubt whether testimony is receivable for the purpose of establishing the oral agreement or contract pleaded by the plaintiff, but, constrained by certain decided cases apparently supporting the plaintiff's view, and without the time to give the matter thorough consideration, I resolved the question in its favor. The instant case is a striking illustration of the peril to commercial transactions of recognizing the validity of oral understandings. If the obligation to pay was to be absolute there was no conceivable reason why the plaintiff should, not have taken Romeo's signature. But however that may be, I entertain no doubt as to the correctness of the finding of the jury. Indeed, it is a serious question whether, if the verdict were for the plaintiff, a Court should permit it to stand. In the light of the circumstances, the claim of an oral agreement absolutely to accept or to pay the

draft is inherently improbable, and in view of the general and unsatisfactory testimony of the bank officers, it is difficult to see how the jury could have reached a different conclusion. [23]

As to certain exceptions to the introduction of evidence, it is only to be said that, considering the nature of the testimony as to what occurred in the bank, it was thought proper to let the jury have the benefit of all the surrounding circumstances, and hence the evidence was permitted to take a fairly wide range.

Complaint is made of the reception of a telegram and letter sent by the defendant's representative in California to his home office in New York, but counsel for the plaintiff had asked him about his report to his home office and as to whether or not the home office had made any objection relative to what he had done. Under such circumstances it was thought to be only fair to the defendant that the reports themselves should be received in evidence, in order to put at rest any question as to what such reports contained, and to avoid any improper inferences from the failure of the home office to make complaint or to raise any objection immediately upon receiving them.

As to the instructions, attention has already, in the memorandum incident to the settlement of the bill of exceptions, been called to the fact that no adequate exceptions were taken to the instructions.

Besides it is not now thought that the criticism so far as it relates to the substance is well founded.

Slight changes in phraseology might have been made had attention been particularly drawn to the portions now complained of, but in substance, it is still thought, they were correct, and gave the jury a just understanding of the law. Feeling that the case was skillfully tried by counsel and fairly submitted, and that the verdict is right, I must decline to grant a new trial.

[Endorsed]: Filed Sept. 12, 1921. Walter B. Maling, Clerk. [24]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

Number 16,417.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC., and F. ROMEO,
Defendants.

Plaintiff's Engrossed Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled action came on regularly for trial on the 17th day of June, 1921, before the above-entitled court, Honorable Frank S. Dietrich, presiding, and a jury duly

impaneled and sworn, Louis Ferrari, Esq., appearing as counsel for plaintiff and Wm. H. Gorrill, Esq., and Delger Trowbridge, Esq., appearing as counsel for defendants, and that the following proceedings were had.

Testimony of J. E. Fickett, for Plaintiff.

J. E. FICKETT was called on behalf of plaintiff, was sworn, and testified as follows:

Direct Examination.

I live at Number 43 Parkside Drive, Berkeley, California, and am a Vice-President of the Bank of Italy. For the past three and a half years I have been head of the Credit Department, and act as such for all of the branches of the Bank of Italy. I frequently examine the different branches of said Bank with reference to matters of credit. [25]

The draft you show me dated May 2, 1919, for \$5,743.63 drawn on F. Romeo & Co., Inc., Number 374 Washington Street, New York City, N. Y., by F. A. Mennillo, by C. R. Mennillo, his attorney-in-fact, I have seen before, both in Los Angeles and in San Francisco, California. The records of the Bank of Italy show that it has never received payment for this draft, neither from F. Romeo & Co. nor from Mr. Mennillo, and that this draft is carried in our Suspense Account.

Testimony in Deposition of Joseph Ladato, for Defendant.

Counsel for plaintiff then read into the records the following excerpts from the deposition of JOSEPH LADATO, who was duly sworn before a duly appointed Commissioner in New York City, N. Y., and who testified as follows, on page 22:

Direct Examination.

I reside at Number 1567 Fulton Avenue, Bronx, New York City, N. Y., and am Secretary and Assistant Treasurer of F. Romeo & Co. During April, May, June and July, 1919, I was Assistant Treasurer and one of the Directors of said Company; the other officers were as follows: F. Romeo, President; G. F. Romeo, Vice-president; M. J. Romeo, Treasurer; Philip Italiano, Secretary, and E. M. Pica, Assistant Secretary. The six officers and F. H. Dassori were the Directors.

Continuing on page 25 of said deposition: F. Romeo sent through the mail two invoices attached to the two bills of lading. These bills of lading did not provide for inspection of the olives.

Continuing on page 30 of said deposition: Greek Olives are black olives which are imported from Greece, while Greek Style Olives are black olives cured in California, [26] according to the Greek process. We first began to handle Greek olives in 1917.

(Testimony of Joseph Ladato.)

Continuing on page 58: After I made the inspection of the car of Greek style olives and the first two cars of the ripe olives, a draft was presented to me by the East River National Bank for the Bank of Italy, a copy of which draft is set out in paragraph five of the complaint; I do not remember the exact date when this draft was presented, but it must have been after May 2d. It was presented after the arrival of the car of Greek style olives and the first car of ripe olives. Mr. Italiano and I were present when it was presented by the East River National Bank, by messenger. Mr. Italiano died on March 27, 1920, and I was present at his funeral. The messenger who presented the draft said nothing; the draft was presented for acceptance and not for payment. I say this, because there was no acceptance on it. No letter or other writing accompanied the draft when presented—just the usual memorandum of the banks attached to it. This memorandum is a slip of paper stating whether to pay or to accept. I do not remember the exact wording of the memorandum stating whether the draft was presented for acceptance or for payment. The draft was sent back unaccepted. I do not know where the draft is now; it must be in the hands of the Bank of Italy. The memorandum accompanying the draft must have been returned with the draft; I do not keep the memorandums. When the draft was first presented to me that day, I do not remem-

(Testimony of Joseph Ladato.)

ber whether any memorandum was attached to it; I told the messenger that we would not accept the draft as we did not find the goods satisfactory. The messenger then went back to the bank.

Cross-examination.

Continuing on page 68: Francis Romeo did not act as a representative of Romeo & Company in business transactions while in California during the summer [27] and fall of 1918. He was instructed to inspect the goods which we bought from Mr. Mennillo. The inspection was made in California. Mr. F. Romeo tried to get information for us, for goods we might buy, and give us information about market conditions in California. As to handling financial arrangements for Romeo & Company while in California, he used a letter of credit in order to pay the Mennillo invoices.

Continuing on page 69: Romeo & Company corresponded with Francis Romeo all the time he was in California during 1918 and 1919; all of the correspondence was relative to the shipment of olives under the Mennillo contract. Romeo & Company issued a letter of credit to Francis Romeo payable in California in 1919 for the account of Romeo & Company. Francis Romeo was inspecting olives shipped, or to be shipped, by Mr. Mennillo, under a contract with Romeo & Company during 1918 and 1919.

Continuing on page 70: Francis Romeo was act-

(Testimony of Joseph Ladato.)

ing in behalf of Romeo & Company in California in 1918 and 1919. Romeo & Company requested him to examine the olives shipped under the contract with Mr. Mennillo in California during 1918 and 1919. When Francis Romeo examined the olives shipped under this contract and cashed or presented the letter of credit issued by Romeo & Company, he was doing so at the request of Romeo & Company.

Continuing on page 86: The F. Romeo referred to in the testimony in these proceedings as being in California in the fall of 1918 and summer of 1919, is Francis Romeo, President of F. Romeo & Company.

Continuing on page 99: The draft was presented to me and I refused to accept it. Under the By-laws of F. Romeo & Company, I am not authorized to accept [28] a draft unless in connection with one of the three other officers. The Board of Directors of F. Romeo & Company agreed to refuse acceptance of that draft because the goods were not satisfactory, and they authorized me to so refuse the acceptance, which authorization was not in writing.

**Testimony in Deposition of F. A. Mennillo, Taken on
Behalf of Plaintiff.**

Counsel for plaintiff then read into the records the following deposition of F. A. MENNILLO, who was duly sworn before a duly appointed Commissioner, in New York City, N. Y.

(Testimony of F. A. Mennillo.)

Direct Examination.

I reside at the Johnathan Club, Los Angeles, California. I was engaged in business during 1918 and 1919 as an olive packer in Los Angeles, California. I remember a certain contract executed by F. Romeo & Company and myself, and the original or copy of said contract is now in the files of my company in California, which contract provided for the method of shipment and acceptance of the merchandise. The olives were shipped according to contract. The contract was made between John Romeo and Philip A. Italiano, Secretary of Mr. Romeo's firm, and myself; it was executed in New York. John Romeo was not in California prior to the first shipment of olives under this contract, but F. Romeo, a member of F. Romeo's firm, was present. F. Romeo examined these olives at my plant, the shipping point, before they were shipped. I do not remember exactly the price of this particular carload of olives, but it was, more or less, about \$13,743.63, being one car of 142 barrels of Greek Style Black Olives, and 1,043 cases, one-half dozen each, Ripe Olives. I got all the money for the shipment for both cars through the Bank of Italy. As to whether or not Romeo & Company paid the purchase price of these carloads; I know [29] that a balance was left to be paid for the Bank of Italy, about \$6,000.00, more or less, the market price of olives was dropping about the month of April, 1919,

(Testimony of F. A. Mennillo.)

and has been dropping since and were selling at that time around 14¢ o pound in New York. I do not remember whether our firm received any notice of rejection from F. Romeo & Company from the receipt of these olives in May, 1919, to date, but no proper rejection has been made, if any. We have received no notice of rejection of these olives as provided for by the terms of our contract with F. Romeo & Company. My brother C. R. Mennillo, has my full power of attorney, to act and appear in my behalf in any transactions covering my business, and I authorized him to conduct any negotiations or make any arrangement for the payment of the purchase price of these olives with F. Romeo & Company, or its agent. The olives shipped on the above date have not been returned to me, nor any part thereof.

Cross-examination.

In April, 1919, I was traveling and cannot state exactly where I was when the first car of olives to which I have referred, was shipped. This car was shipped on April 18, 1918. I did not see this car, but in the first part of April, I was in Lindsay with Mr. F. Romeo and Mrs. Romeo to allow inspection of olives to be shipped. I did not see the second car of olives shipped. I was paid for this shipment through the Bank of Italy; I was paid in currency put to the credit of my account in the same bank in Los Angeles. I don't know if they credited all at one time or at different times, but I got credit for the full

(Testimony of F. A. Mennillo.)

amount of the invoice for both cars. I do not know where I was on May 2d, 1919, but I was probably in New York, because that is the time when I make my Eastern trips. I never saw the letter of credit F. Romeo had in Los Angeles and which was given him by the East River National Bank. I do not know how the payments were made by [30] Romeo & Company for these two cars. The first dealings with them was had by myself and completed by my brother, C. R. Mennillo. I do not remember whether I ever saw the original of that letter, a copy of which you hand me, being dated April 22, 1919, addressel to F. A. Mennillo, Los Angeles, and signed F. Romeo. I do not remember whether I was in Los Angeles at the time this letter was sent. (Marked Defendant's Exhibit "A" for Identification.)

I do not remember having received the telegram, a copy of which you hand me, dated May 23, 1919, from F. Romeo & Co., Inc., addressed to F. A. Mennillo, 226 North Los Angeles Street, Los Angeles, California. I cannot say one way or another whether this telegram was received at our office. (Telegram marked Defendant's Exhibit "B.")

The telegram you hand me dated May 24, 1919, from F. A. Mennillo, Los Angeles, to F. Romeo & Company, was sent by my office. (Telegram marked Defendant's Exhibit "C.")

My telegram, Exhibit "C," is an acknowledgment of the receipt of Exhibit "B." When I testified that

(Testimony of F. A. Mennillo.)

I did not receive any notice of rejection from Romeo & Company, I was not in error. A claim is not a rejection. I do not remember having seen the telegram, a copy of which you hand me dated June 4, 1919, from F. Romeo & Company to F. A. Mennillo, Los Angeles. (Telegram marked Defendant's Exhibit "D.") I do not remember how many cars of Greek Olives we shipped to Romeo & Company in April or May, 1919. I do not remember whether we shipped more than one car of olives. Defendant's Exhibit "D" might have been in the office, but I did not see it. My firm sent the telegram, a copy of which you hand me dated June 5, 1919, from F. A. Mennillo, Los Angeles, to F. Romeo & Company. (Telegram marked Defendant's Exhibit "E.")

I do not remember receiving the telegram, a copy of which you hand me dated June 10, 1919, from Romeo to F. A. Mennillo. (Telegram marked Defendant's Exhibit "F.") [31]

I do not remember receiving the telegram, a copy of which you hand me dated June 13, 1919, from Romeo & Company to F. A. Mennillo. (Telegram marked Defendant's Exhibit "G.")

I do not remember receiving the letter, a copy of which you hand me dated July 9, 1919, from Romeo & Company to F. A. Mennillo. (Letter marked defendant's Exhibit "H.")

The telegram, a copy of which you hand me, F. A.

(Testimony of F. A. Mennillo.)

Mennillo to F. Romeo, dated July 10, 1919, is from my office. (Telegram marked Defendant's Exhibit "I.")

The letter dated July 16, 1919, a copy of which you hand F. A. Mennillo to F. Romeo & Co. was sent by my firm. (Letter marked Defendant's Exhibit "J.")

The only contract for the sale of these olives made by me with Romeo & Company is a written contract. That contract was for shipment of olives for which recovery is sought in this suit. The contract provided for arrangements as to payment of these olives, which were letter of credit against bill of lading to be presented at any bank in California. The letter of credit was to be for the full amount. I do not remember for how much the letter of credit was, and I do not know that in this particular case the letter of credit was for less than the full amount, because I was paid in full; I do not remember having heard it was for \$8,000.00. I cannot say that on or about May 2, 1919, I discounted with the Bank of Italy a draft drawn on F. Romeo & Company for \$5,743.63. My office presented to the Bank two drafts covering the amounts of the shipments involved in the litigation. I do not remember the exact amount of each draft. I do not know whether the shipments were paid for by letter of credit against the bill of lading. I was paid in that way by the bank. I mean that, according to the con-

(Testimony of F. A. Mennillo.)

tract, I presented the draft and bill of lading at the bank and [32] received payment according to the amount stated in the invoice. I am not interested in knowing how those payments should be paid by F. Romeo & Co. when I have been paid according to the terms of contract. I drew the draft complying with the contract. I drew two drafts for payment of the two shipments and was paid for them. I do not remember the amount of either one. All of my drafts were drawn against the letter of credit and I received money for them. The contract calls for a letter of credit and I assume there was one for \$13,743.63 when I was paid. However, I do not know this of my personal knowledge. My firm drew these drafts and I do not know whether they were signed by my brother or myself. As I drew two drafts instead of one against the letter of credit, we had two bills of lading, and it is not necessary to have only one letter of credit to cover different shipments. We did not draw the two drafts, because there were two bills of lading; it was a matter of finance. F. Romeo examined the two carloads of olives that we shipped on April 19. I examined both at Lindsay, California, and I made many trips to Lindsay from Los Angeles to inspect the olives. When I inspected them, these two carloads of olives were in Lindsay; they were loading; they were packing in cans and barrels; the Greek Style Olives were in barrels; they were pocked loose,

(Testimony of F. A. Mennillo.)

in bulk. I do not know which car of olives was shipped first, the olives in bulk or those in cans. According to the dates on the invoice you show me, the Greek olives seem to have been shipped first. The first car was shipped on April 18, 1919. I cannot say how long before that date Mr. Romeo and I saw these Greek Olives, but it must have been in the month of April. I do not know if it might have been the month of March. When Mr. Romeo saw these Greek Olives, I do not remember whether or not some of them were already in the car. Mr. Romeo saw these olives before they were put in barrels. He also saw them after they were [33] put in barrels. I cannot say what time elapsed between the time he first saw them and the second time, Mr. Romeo and I having made various trips to inspect all olives ready for shipment under the contract. We shipped other Greek Olives to Romeo, and the invoices will show the exact date of the previous shipments. Mr. Romeo inspected all of the Greek Olives not at the same time, but at different times. I did not keep track of the dates when Mr. Romeo and I went to the plant to inspect these olives. We were not shipping olives to anyone other than Romeo from that plant at the same time that his olives were being shipped. Mr. Romeo also inspected the car of ripe olives about the same time he inspected the others. We packed the ripe olives between November 15th and January 30th. They

(Testimony of F. A. Mennillo.)

were put in cans and sealed, all of the cans sealed at the same time, only the labels and cases to be provided for shipments. Mr. Romeo inspected the olives in the cans. We opened many cans while he was at the plant. After they were sealed, we opened some cans for his inspection. I cannot state when this inspection was made.

Redirect Examination.

Our contract with Romeo & Co. was signed on behalf of said Company either by the Secretary Italiano or by Mr. G. F. Romeo. I do not remember whether or not I was present when it was signed.

F. A. Mennillo & Co. was paid the full purchase price for the two shipments, the subject of this suit, by the Bank of Italy. Mr. F. Romeo examined all olives shipped under this contract at our plant in California. We have not completed the shipments under this contract, but I have tendered the delivery of all olives still to be shipped under this contract. The telegram you hand me (Defendant's Exhibit "D") covers more olives than those which are the subject of this suit. It covers different shipments than those involved herein. [34]

At no time prior to the shipment of these olives did F. Romeo object to the quality of any of the olives shipped, and F. Romeo made the customary trade inspection of all olives shipped under this contract.

(Testimony of F. A. Mennillo.)

Recross-examination.

F. Romeo inspected all of the olives we shipped.

After the olives are canned, the cans are sealed. To inspect them, the buyer orders us to open some cases of his selection from which cans are opened. The cans thus opened are thrown away. Inspection is made of so many cases per cent of the lot to be shipped. Mr. Romeo selected here and there throughout the lot, and examined certain cans. The barrels with the Greek Olives are closed tight, removable on request and the bung is always removable. The olives can be inspected and the top replaced.

An adjournment of court was taken until Monday, June 20, 1921, at ten o'clock A. M. [35]

On Monday morning, June 20, 1921, at 10:00 o'clock A. M., the trial of this case was continued and the following proceedings were had:

Testimony of C. R. Mennillo, for Plaintiff.

C. R. MENNILLO, a witness on behalf of the plaintiff, was sworn and testified as follows:

Direct Examination.

I live in Pasadena, Los Angeles County, California. I am now in the brokerage business and was in that business during the year 1919 at which time I lived at Hollywood, California. During the month of May, 1919, I was connected with the firm of F. A. Mennillo. This firm was engaged in the packing and brokerage business and dealt mostly in olives. Their

(Testimony of C. R. Mennillo.)

plants were at Lindsay, Santa Barbara, Cocomima, and Sunland. They made an office in Los Angeles. F. A. Mennillo was the sole proprietor of said firm and was the only member of it. He was doing business under the name of F. A. Mennillo. I was employed by that firm as manager and looked after the business in general, in the Los Angeles office. I did not look after the financial matters, making collections for olives that were sold, et cetera. During the month of May, 1919, I met F. Romeo. I had known him for years, for many years. I met him about the 2d of May, 1919, when I was called down to the Bank of Italy in Los Angeles by the fact that the bank had two bills of lading for some olives that were shipped to F. Romeo & Company in New York, and they had arranged with Mr. Romeo for a payment on the olives. I got word from the Bank of Italy that there was some transaction going on with reference to some olives, and I went to the Bank of Italy at Los Angeles, 7th and Broadway Branch, and there I met Mr. and Mrs. Romeo. The F. Romeo I there met is connected with the firm of F. Romeo & Company of New York. I had a conversation with Mr. F. Romeo at that time and the only subject discussed was the arrangement for the payment. The parties who took part in that conversation were James Moore, vice-president. I presume of the [36] Bank of Italy, Mr. F. Romeo, his wife and myself. They had two bills of lading and the amount was \$13,743.63, and Mr. Romeo informed us that his New York concern, the amount of the

(Testimony of C. R. Mennillo.)

letter of credit opened was only \$8,000, and if he could be obliged to give them a draft for the balance at sixty days. The bank seemed to be satisfied with the arrangement and the transaction was closed right there. The Bank of Italy had the bill of lading. The entire stock of F. A. Mennillo had been pledged to the Bank of Italy as collateral for a loan. There was only one draft issued. The bank was paid \$8,000 cash and the balance this draft, and I was paid by one draft \$8,000 in cash. The signature F. A. Mennillo by C. F. Mennillo, attorney in fact, on the draft for \$5,743.63 is my signature. I signed the name of F. A. Mennillo to the draft myself and endorsed it to the Bank of Italy. I gave that draft to the Bank of Italy after signing and endorsing it. I do not know what became of the two bills of lading for the two cars of olives after I gave that draft to the Bank of Italy. I left the bank. We were given credit by the bank for \$13,743.63.

The draft was then offered in evidence and marked Plaintiff's Exhibit No. 1.

The draft was then read to the jury. Draft dated May 2, 1919, drawn by F. A. Mennillo on F. Romeo & Co., Inc., payable to the order of F. A. Mennillo in the sum of \$5743.63.

C. R. MENNILLO continuing to testify:

F. A. Mennillo & Company has never repaid the Bank of Italy for this money.

Cross-examination.

I know the Bank of Italy gave F. A. Mennillo

(Testimony of C. R. Mennillo.)

credit for the amount of this draft. I had the bank-book and it was entered in said book. I know also from the bank statement. I have neither the bank-book nor the bank statement with me. At that time F. A. Mennillo owed some money to the Bank of Italy but I do not know how much. Only one draft was drawn on this specific transaction. There was a letter of credit to F. Romeo & Company. They did not have to draw a draft in order to get the money on a letter of credit. The money of the letter of credit was sent as far as I know to F. Romeo for this specific deal, for these two bills of lading, to apply this money to [37] these specific bills of lading. The money was due to the Bank of Italy, because the Bank of Italy had possession of the bills of lading and the goods were in the possession of said bank. The Bank of Italy made no contract with F. Romeo & Company. That company sold no olives to the bank. F. A. Mennillo made the contract. If any money was owed for olives it was owed to F. A. Mennillo. The draft for \$8,000 under the letter of credit should have been signed by somebody. If a draft was drawn for the \$8,000 I do not know who drew it. I know that Mr. Romeo paid the Bank of Italy on these two bills of lading \$8,000 cash and as far as I know it was a letter of credit; I don't know if he made any draft to draw this money or not. There was only one draft drawn by myself acting for F. A. Mennillo. This draft was drawn by the bank and I signed it at 10:00 o'clock in the morning on May 2, 1919. After the conversa-

(Testimony of C. R. Mennillo.)

tion before referred to, the draft was drawn and I signed it. I don't remember whether anyone on behalf of the Bank of Italy or anyone in the conversation asked Mr. Romeo to accept the draft in writing or promise to accept the draft in writing.

Testimony of James O. Moore, for Plaintiff.

JAMES O. MOORE was called on behalf of the plaintiff, was sworn and testified as follows:

Direct Examination

I live in Los Angeles, California, and am employed by the Los Angeles Trust & Savings Bank as an assistant to the president. In May, 1919, I was assistant manager of the Bank of Italy at its 7th and Broadway Branch, Los Angeles, California. While so employed I met both Mr. C. R. Mennillo and Mr. F. Romeo. I had met both these gentlemen before that time, on several occasions and in other transactions. The draft, Plaintiff's Exhibit 1, came under my notice while employed by the Bank of Italy at that time. At the Bank of Italy, Mr. Romeo, I believe, came into the office first and Mr. Mennillo followed shortly after with a bill of lading covering either [38] a car or two carloads of olives, against which the East River National Bank issued an acceptance credit up to \$8,000, I believe, I am just a little vague on that, together with a draft payable on arrival of goods or at sight, which Mr. Romeo O.K.'d and accepted the bill of lading for. I refer to two drafts, one for \$8,000 which was covered by the East River guaranty and the other the draft, Plain-

(Testimony of James O. Moore.)

tiff's Exhibit No. 1. At the time the draft sued on here was drawn there were present Mr. Romeo, Mr. Mennillo and, I believe, Mrs. Romeo. This draft was simply to take up the balance between the invoice and the letter of credit. Letter of credit was for \$8,000, if I remember correctly; it was two years ago. This draft, Plaintiff's Exhibit 1, represents the excess of the invoice for the two cars of olives over the letter of credit. Upon the drawing of the draft, at the request of Mr. Mennillo, I handed the bills of lading to Mr. Romeo to be forwarded on to the company. If I remember correctly there was nothing further said other than the ordinary conversation that would probably transpire in any transaction of this character. I thereupon gave F. A. Mennillo & Company credit on this transaction and also on the transaction involving the acceptance. In other words, I credited his account with \$8,000 and with \$5,743.63. Mr. Mennillo himself brought in the bill of lading at the time these gentlemen came to the bank. To my knowledge at that time none of these goods were in pledge to the Bank of Italy. I cannot remember exactly when these cars went in pledge to the Bank of Italy; some were in pledge and some were not. Eventually all went into pledge. These, however, had been released if they had been pledged. I left the Bank of Italy on December 13, 1919, and up to that time neither F. A. Mennillo nor F. Romeo & Company had reimbursed the Bank of Italy.

(Testimony of James O. Moore.)

Cross-examination.

I cannot give the exact details of the conversation which took place during this transaction, but the bill of lading was presented and Mr. Romeo was there to accept the bill, see that the acceptance was drawn, also [39] this draft that you have reference to and nothing more was said other than that which would transpire in any other ordinary business transaction. There is nothing else I can recollect. Those present at the conversation were Mr. Lacy, my assistant at that time, Mr. Romeo and, I believe, I cannot state exactly, Mrs. Romeo and also Mr. Mennillo; *no else* to my knowledge.

Testimony of T. W. Lacy, for Plaintiff.

T. W. LACY, a witness called by the plaintiff, was sworn and testified as follows:

Direct Examination.

I live in Los Angeles, California, and am employed in the Loan Department of the Los Angeles Trust & Savings Bank. I was employed by the Bank of Italy in the month of May, 1919. I was a clerk in the Loan department at 7th & Broadway Branch. I overheard a conversation that took place in that office on the 2d of May, 1919, between Mr. James O. Moore, Mr. C. R. Mennillo, F. Romeo and his wife. As nearly as I can relate the conversation was to the effect that Mr. Mennillo requested that we deliver the bill of lading on this draft to F. Romeo & Company, which we did, and we gave R. Mennillo & Company credit for the face value of the draft. I was

(Testimony of T. W. Lacy.)

not there during the whole of the conversation. Mr. Moore called me up when part of the conversation had been completed, if I remember correctly. At that time Mr. Romeo stated that upon arrival of the goods in New York, they would accept the draft.

Cross-examination.

Mr. Mennillo requested the Bank of Italy to deliver the bill of lading covered by this draft to Mr. Romeo, which the bank did, and Mr. Romeo stated the draft would be accepted upon its presentation and arrival of the goods in New York. There were two drafts, one for \$8,000 drawn under a letter of credit, issued by the East River National Bank and another for some \$5,000-odd dollars, being the difference between the amount of the invoice and the amount of the letter of credit for \$8,000 of the East River [40] National Bank and the one I am referring to is the one that was not covered by the letter of credit. The draft for \$5,743.63 was present at the meeting and was already drawn when Mr. Romeo said that it would be accepted upon its presentation and arrival of the goods in New York. It has been so long ago that I could not state whether Mr. Moore asked Mr. Romeo to accept the draft in writing at that time or promise in writing to accept the draft. I did not, and as far as I know nobody asked Mr. Romeo to accept it in writing or promise to accept it in writing.

Plaintiff thereupon rested his case and the defendant offered the following testimony:

DEFENDANT STATES:

Testimony of Francisco Romeo, for Defendant.

FRANCISCO ROMEO, a witness called on behalf of the defendant, was duly sworn and testified as follows:

Direct Examination.

I live in New York and have known the firm of F. Romeo & Company, Inc., since the time it stated. About seven years ago I organized it. They are importers of food products and manufacturers, and the principal place of business is located at 374 Washington Street, New York City. During the year 1918 our firm made a contract with F. A. Mennillo for the purchase of [41] olives. I recognize the document you hand me. It is one of the originals of that contract of purchase and was signed by "seller, F. A. Mennillo, per somebody." The party who signed that was connected with the firm about that time. The contract was then offered in evidence as Defendants' Exhibit "A." Counsel for plaintiff objected to the admissibility of this exhibit on the ground that no foundation had been laid in that it did not appear that this contract was called to the attention of the Bank of Italy or that the Bank of Italy was in any way bound by it. The Court thereupon overruled said objection, to which ruling counsel for the plaintiff duly excepted and said exception is here designated as Exception No. 2.

Insert here copy of contract, Exhibit "A."

On May 2, 1919, I was in the Bank of Italy. I remember that date because I had business to transact

(Testimony of Francisco Romeo.)

and my wife was there with me and it was her birthday. I went there to settle for a shipment of olives with Mr. Mennillo. I had had some conversation with Mr. Mennillo before that time with regard to the matter. Mr. Cielo Mennillo, who was a witness on the stand here this morning, came to me and we had a conversation before we went to the bank, and Mr. Mennillo notified me—counsel for plaintiff here objected. “If your Honor please, we will object to any conversation that took place between this witness and Mr. Mennillo before they went to the bank, on the ground that it would not be binding on the plaintiff in this case, the Bank of Italy, it having taken place outside of its presence.

By the COURT.—“I think inasmuch as under the pleading the parties differ as to what occurred at the bank, I shall permit this to go in as an explanation bearing upon the general question as to whether or not the agreement pleaded in the complaint was made, or whether it was the agreement stated in the answer.” To this ruling counsel for plaintiff duly excepted and said exception is here designated

EXCEPTION No. 3.

Mr. Mennillo notified me that on the 18th of April they shipped two cars of olives; then I told him that I would not accept that shipment [42] as they did not call it to my attention to approve the quality. Then he said to me—counsel for plaintiff here objected to the conversation on the ground that it varied the terms of a written contract already in evidence. The Court thereupon overruled the objec-

(Testimony of Francisco Romeo.)

tion, to which ruling counsel for the plaintiff duly excepted and said exception is here designated

EXCEPTION No. 4.

It was understood that all the olives before shipping should have been approved by myself and when that shipment was not examined, I objected to taking that shipment. Then he invited me to make some proposition. I offered him about fifty per cent of the invoice because the previous shipment of olives was not satisfactory in quality, and then we agreed that I was going to pay \$8,000 and the balance was to be conditioned on accepting a draft in New York after the examination and approval of the quality of the olives. That conversation took place in the Clark Hotel, Los Angeles, where I was living at that time. A day or two after this conversation, to wit, on the second day of May, we went to the Bank of Italy. I know it was after because I notified my office that we agreed to accept \$8,000 and I had to notify them to open a credit for that amount on these two shipments. And this they did. With the East River National Bank, New York City, my firm opened a letter of credit in favor of the Bank of Italy for \$8,000. On the 2d of May, Mr. Mennillo agreed that we had to pay \$8,000 on account of that shipment; if the quality of the goods after the arrival in New York and examination by my people there was satisfactory then they were to accept a draft at sixty days sight in favor of Mennillo, if the quality of the goods was satisfactory. That was the

(Testimony of Francisco Romeo.)

understanding with Mr. Mennillo at Los Angeles. We went to the bank on May 2d and there I told Mr. Moore the same arrangement that I had made with Mr. Mennillo. I told him that we were not paying the full amount of that invoice because I had not examined the quality of the goods. The amount of the invoice of those two cars was \$13,743.07, I think. At the bank there was no conversation about this draft. About the middle of June I went to New York and there saw the olives that were covered by these two [43] invoices. At that time I inspected the olives and found them a very poor quality. The Greek style olives were of a very inferior quality and some of them were not even fit for human consumption. They were reddish; black olives should be black. If they are reddish, then they are considered of an inferior quality. It showed poor processing. Furthermore, they were not graded; generally, olives are graded but these olives were all mixed, poor and bad and all sizes. The black olives, the Greek style, were inferior in this that some were soft, some were reddish and they were not uniform in quality. To be soft is not a good quality; to be reddish is not a good quality. It is not proper to have sizes mixed in a barrel; if they are not properly graded it affects the quality. These olives were shipped on the 18th of April, before I had this transaction at the bank. Between the 18th of April and May 2d we had this conversation; I rejected the olives and I did not

(Testimony of Francisco Romeo.)

want to take them, because I had not inspected the quality. I had had no opportunity to inspect them before they were shipped. They were in transit when he told me he had shipped these olives and he notified me that he had made shipment without notice. After my arrival in New York I also inspected the ripe olives. I made inspection by the usual method, to wit, by opening several cans which we took from several cases. Ripe olives should be graded according to size that they specify in the can; if they are marked "standard" they should be standard; if medium they should be marked "medium"; and should not be soft. These ripe olives I found not graded and there was a great percentage that were soft and of bad taste. Canned ripe olives should be hard; they should be firm. That is the only quality that is acceptable. When soft, of course, they are not usable; they are going in a state of decomposition. During the months of May and June, 1919, the market for olives was firm; the price had not gone down but remained firm for some time; in fact during all 1919, because there was no importation from Greece. That applies also to California ripe olives, because that is a California specialty and there never has been any importation of ripe olives from Europe.

[44]

Counsel for defendants then asked the following

(Testimony of Francisco Romeo.)

question: "Did you get any other instructions from them other than that?"

By Counsel for Plaintiff: "We object to that on the ground it is immaterial, irrelevant and incompetent. The witness has already testified that this transaction was authorized by the firm."

Counsel for defendants next asked: "What were the instructions that you got from your firm?"

Mr. FERRARI.—"We object to that."

The Court thereupon overruled said objection, to which ruling counsel for the plaintiff duly excepted and said exception is here designated

EXCEPTION No. 5.

The witness answered: I had instructions to pay \$8,000 on that invoice, and then, of course, the sixty day sight draft to be accepted in New York after the examination and approval of the quality of the olives.

Cross-examination.

I am now and have been since the organization of F. Romeo & Company, president of that firm. The firm was incorporated in 1914. I was president of said firm on the second day of May, 1919. I was president up to and *passed* the second day of May, 1919, of F. Romeo & Company. I came to California the latter part of November, 1918, and remained in California until June 3, 1919. I know where Lindsay, California, is and I visited there with Mr. F. A. Mennillo and Mrs. Romeo. I went

(Testimony of Francisco Romeo.)

there to see the process of the olives because that was the first part of December. I had entered into some negotiations for the purchase of olives from F. A. Mennillo and I went up there to Lindsay to see the olives in process; the olives were in process at that date because that was the part of December. I stayed there a couple of hours; we got there late and we slept in a hotel and then the morning after we left for San Francisco. I did not make an examination of the olives that Mr. Mennillo had on hand at that time because they were all in bulk in big kegs, they were in process; I did not see them. I went there to examine the olives but I did not pick up either the black olives nor the ripe ones [45] to examine the quality and the size because they were in process and it was not complete. I looked at the process but I could not see that the quality was good or bad; I could not see because they were in the course of processing; in fact, I told him there was no use to come here this time of the year, and he said, "Well, we will come again when the goods are ready to be shipped." There were some green olives that were ready for shipment and those were accepted and paid for, a lot of green olives in barrels. I did not examine any olives that were still on the trees. As far as grade and size are concerned, I could not have told when I saw the olives in course of processing whether they were properly graded or not, because they were mixed

(Testimony of Francisco Romeo.)

together. He said they were going to select them after the processing. I did not know at that time that the selection of olives is always made prior to the processing. I do not know if that is the right way of doing, because I have never been a party to olive processing. I was not in a position to complain at that time because the process was incomplete. About the 6th of December I visited Lindsay and again four or five days later we were back in Los Angeles and stopped again for a couple of hours there. On the second trip I did not look at the olives. We only stopped very shortly. We did not stop at Lindsay to look at the olives but only to have a rest. I was in poor health at the time and it was too hard for me to make a continuous trip. I stopped at Lindsay because I was in poor health and not to look at the olives. As I remember we went to Lindsay just to salute the people and so on, and I did not look at the olives. We went to the olive plant where the olives were being processed. We were with Mr. Mennillo. They showed me the olives that were in process. After that visit I did not go to Lindsay again until June 3d; that was the day we left for New York. Prior to May 2d I made only two visits to Lindsay. I saw a lot of olives that were in process and the process was not complete, and it was out of the way to express any opinion about the quality. We did not open several cans to examine olives; they were

(Testimony of Francisco Romeo.)

in big tanks of a thousand gallons or so; I did not see any cans nor tin [46] containers. Before I went to Lindsay I did not know that these olives were in the course of process because I did not know if they were ready for shipping or not. Mr. Mennillo told me to stop and see the way the olives were processing and I did. During the conversation I had with C. R. Mennillo at the Clark Hotel, Los Angeles, Mrs. Romeo was present. Our conversation took place in the mezzanine of the Clark Hotel and the meeting was arranged by telephone. Mr. Mennillo telephoned to me that he was coming. I do not remember how long it was prior to the 2d of May because he came there several times and talked about the shipment of April 18th. At that conversation I agreed to accept this draft for \$5,000 after the goods arrived in New York and proved to be satisfactory, and I agreed to pay \$8,000 on the letter of credit. The \$8,000 letter of credit was established as soon as we agreed that he was going to accept \$8,000. It is not a fact that I had a letter of credit issued to me prior to that for a larger amount and that this \$8,000 was the balance because it expired. Previous credit that I had expired because we had several other shipments before this one of April 18th, so I had no more credit in my possession and when we agreed that he was going to accept \$8,000 on account of that shipment, then I wired my office to open the credit for that amount in my favor. I had a letter of credit for other shipments, but I don't remember if I used it all up;

(Testimony of Francisco Romeo.)

if I called for other credit that meant that I didn't have any more credit in my possession. It is not a fact that the old credit had a balance of \$8,000 left and that that was renewed and that was the entire credit that was given me out here. I called that credit especially for that shipment. I went to the bank alone, and Mrs. Romeo came there later. Still later Mr. Mennillo arrived. I do not remember exactly that we again had the same conversation in the bank which we had previously had with Mr. Mennillo at the Clark Hotel with reference to this shipment. It was all agreed he was going to draw sixty days sight draft for the balance and my firm was to accept the draft after approval of the quality of these two cars in transit. We were to accept and pay the draft if the quality of the goods was satisfactory. [47]

Question: "Are you sure, Mr. Romeo, that anything was said in the Bank of Italy when you went there to negotiate that draft, with reference to the condition that the draft was only to be paid in the event that the goods were satisfactory?"

Answer: "There was no conversation on the subject."

Witness continuing to testify: If I am not mistaken, I think I reported to Mr. Moore the agreement. I am not positive, but Mr. Moore was satisfied to take that \$8,000. Mr. Moore knew the condition because I stayed there about half an hour in the bank and we were talking about this transaction.

Q. But it is quite possible, Mr. Romeo, that you

(Testimony of Francisco Romeo.)

did not specifically make that conditional statement, namely, that the draft would only be accepted in case the goods met with your approval, in the bank?

A. That was understood; Mr. Moore knew that.

Q. You say he knew that. You had never talked to Moore about it?

A. Well, I stayed there about half an hour in the bank, and we were talking about this transaction.

Q. But you have no independent recollection of making that statement to Mr. Moore, that you say was made in the conversation between you and Mr. Mennillo?

A. Well, if I had promised to accept it on that condition, I would *except* that I would.

Q. That is not an answer to the question. You are not positive, as you have just stated?

A. I think we had the conversation, otherwise Mr. Moore would not have accepted the draft.

I am not a banker; my son is a director of the East River National Bank of New York City. We have some stock in the East River. I have never acted as a director of the East River National Bank, but I was a director of some bank years ago.

The firm of Romeo & Company has a good reputation; a reputation for selling nothing but goods that are perfectly satisfactory in all respects. We hope to keep up that reputation. After the olives arrived in New York they were examined by me and by other members of our firm. I did not leave them at the railroad station. They were in our store. They were there at the time they were ex-

(Testimony of Francisco Romeo.)

amined; that was the understanding. We never re-delivered them to the [48] railroad station; we offered them to Mr. Mennillo if we got our money back; we held the olives subject to his orders. The correspondence will show that. There ought to be correspondence showing that we advised Mr. Mennillo that we held the olives subject to his order. We sold these olives because he insisted that the olives were good quality and before they were a total loss we thought it better to sell them the best we could. I do not know that we sold all these olives; my office takes care of the business as I am not active in the firm. As my office is in charge of the sale I cannot say whether or not these olives were sold to customers who came there and themselves sampled the olives and after sampling purchased them. I did not exactly understand that the Bank of Italy had advanced some money on this transaction; at one time Mr. Mennillo told me that the Bank of Italy was doing a favor for him. If the Bank of Italy was discounting, I did not know they were discounting the draft. It was distinctly understood that I was paying \$8,000 and that we intended to assume no more obligation on that shipment until the goods were examined in New York. I do not know if it was Mr. Moore or Mr. Mennillo who gave me the bill of lading as we were sitting there. I do not know if it was the Bank of Italy or Menillo. If it was stated at that time that the Bank of Italy was to finance this shipment, by advancing on that draft the difference between the

(Testimony of Francisco Romeo.)

entire purchase price and the \$8,000, I did not know anything about it; but I would not say that such a statement had not been made. I went to the Bank of Italy because it is the correspondent of the East River National Bank, which latter bank opened a credit of \$8,000 in my favor. I had a letter of credit running to me personally, an unconditional letter of credit in my favor for merchandise. I could have drawn a draft against that and given it to whoever I pleased, but it is not regular. It is not a fact that having only \$8,000 to pay for these goods and the goods calling for \$13,000 odd, that I went to the Bank of Italy because I knew that in some way or other the Bank of Italy was going to assist in financing this transaction, and put up the balance of the money. I first knew that the Bank of Italy held this draft [49] when it reached New York. I do not remember seeing this draft in the Bank of Italy on May 2d. I did not see that draft drawn on Romeo & Company and delivered by Mr. Mennillo to Mr. Moore before I received the bill of lading for these goods. I did not see it. I knew that Mennillo was going to draw that draft, but I didn't know when, whether he was drawing that day or after thirty days. But I did know that this draft was going to be drawn by Mennillo against the firm of Romeo & Company and that the Bank of Italy was going to have something to do with the financing of that transaction. I first knew that the Bank of Italy was interested in that draft when it was presented in New York. I do not know if I was in

(Testimony of Francisco Romeo.)

New York at the time the draft was presented; and I do not know if anything was said that the draft was presented by the Bank of Italy and not by Mennillo. I left California on June 3d, and when I arrived in New York about the middle of June the goods were already in my store. I suppose the draft had been presented by that date, but I do not remember. When I was in San Francisco in March, 1920, Mr. Fickett called my attention to the draft, and asked me how about it. I was surprised that the Bank of Italy was talking about this transaction. I said, "Well, you might authorize your correspondent in New York to find out what has become of these olives, because they were so poor that we are meeting with very heavy losses." I did not know that the Bank of Italy was interested. My offices reported to Mr. Mennillo that they wanted to give the olives back and Mr. Mennillo insisted that the olives were of good quality. We wanted to submit an account for the sale of these olives to the Bank of Italy and they did not want to accept that. We never did submit any account to the Bank of Italy for the sale of these olives. We had nothing to do with the Bank of Italy; we notified Mennillo that we kept the goods subject to his order, and unless he gave disposition we were going to sell for his account. I do not remember being present at any time that sales were made of these olives to any of the trade in New York. The market for olives was firm in 1919 for the months following May. It is not a fact [50] that the market for California olives

(Testimony of Francisco Romeo.)

was very seriously affected by the declaration of the Armistice and that the price of California olives steadily declined because no olives came during 1919. It is not a fact that the market fell by reason of the declaration of the Armistice and in anticipation of the arrival of olives, the Greek olives, because there were no importations and good stock was in very good demand. The main object of my trip out here was for my health; I was in very poor health at that date, and I was also here for the purpose of examining those olives and attending to these shipments made by Mennillo. I kept constantly in touch with my office with reference to conditions here, relying mostly all the time on Mr. Mennillo's statements. I kept in touch with my office as to the different moves that I made. Everything I did out here I reported to my office. I act always in consultation with my office, because they are posted; I am not posted on the market conditions because I am not active in business. My office disapproved the way I handled the previous shipment, the one of April 19th, because the quality was very poor. My firm told me I only had authority to agree to accept a draft in a conditional way. I reported everything that transpired with reference to this particular shipment made by Mennillo and which was paid for by that draft of \$8,000 on May 2d; I reported all this to my office and there was no disapproval of what I had done. The goods were taken to our warehouse. We have all bills of lading in our business. I did not have this bill of lading

(Testimony of Francisco Romeo.)

provide for an inspection of goods at the railroad station instead of at my place of business because the bill of lading was drawn that way and they communicated this back to me after the shipment was made. I did not ask to have the bill of lading provide for an inspection at the railroad station; it was not necessary. [51]

Redirect Examination.

The report you show me, a letter, is the report made on May 2, 1919, after the transaction at the bank. It was written for me by Mrs. Romeo to my firm in New York. Counsel for defendant thereupon offered said letter in evidence and counsel for plaintiff objected to it on the ground that it was a self-serving declaration. The Court overruled the objection, to which ruling counsel for plaintiff duly excepted and said *acception* is here designated as

EXCEPTION NUMBER 7.

(Letter marked Defendant's Exhibit "B.")

The telegram you show me addressed to F. Romeo & Co., Inc., dated April 29, 1919, signed by F. Romeo, is the telegram where we agree to pay that money (\$8,000.00). It is the telegram I sent to my firm to tell them what my understanding was of what I had arranged. I sent this telegram. Whereupon counsel for defendant offered in evidence the said telegram to which counsel for plaintiff objected. The Court overruled said objection, to which rule counsel for plaintiff duly excepted and said *exception* is here designated as

EXCEPTION NUMBER 8.

(Testimony of Francisco Romeo.)

(Telegram marked Defendant's Exhibit "C.")

I used the phrase "not being examined," with which this telegram starts off, because they notified me after the goods were shipped, not being examined, the quality of the olives that they shipped to my firm without my authority or my knowledge. The quality of the olives that had been shipped had not been examined because the quality should have been approved by me. [52]

The COURT.—I think, gentlemen of the jury, I should say to you relative to these two documents, that is, this letter and this telegram, they are admitted in evidence not for the purpose of showing what the agreement was; you will have to get that from the sworn testimony here and the other exhibits. But inasmuch as counsel for the plaintiff asked whether the firm disapproved of anything this witness reported, I am permitting these two instruments to go in for the purpose of advising you what his reports were to his firm in New York, and merely for that purpose.

The two trips to Lindsay, to which I testified, during the month of December, were in the year 1918 and the shipments were made in May, 1919. I traveled from Los Angeles to Lindsay by automobile and from [53] Lindsay to San Francisco still by automobile. We stayed in San Francisco for four days at the Palace Hotel, I think. We returned to Lindsay by automobile, so we stopped at Lindsay on the way back. We stayed there just

(Testimony of Francisco Romeo.)

for a rest because I did not want to go all the way direct; it was too much for one trip.

While we were at the Bank of Italy, Mr. Mennillo said we had to draw on my firm for the balance of the invoice at 60 days' sight. The draft was to be accepted after examination and approval of the quality of the olives—that was said in Mr. Moore's presence. I received the bills of lading covering these two carloads, at the bank. I got them from Mr. Mennillo. The letter of credit which I drew for \$8,000.00 was a telegraphic letter of credit addressed to F. Romeo, through the Bank of Italy. I am sure it was not addressed to any other bank in Los Angeles. All the letters of credit were going through the Bank of Italy. Of course, if the letter of credit came through any other bank, then we would go to the bank that sent the notice of the letter of credit; that is etiquette. The Bank of Italy had notice that there was a credit and naturally the operation was consummated in that bank. It is not a very good thing to go elsewhere.

Recross-examination.

When I said in my letter to the firm "the understanding is that after you examine the goods of the two cars in transit, you have to accept 60 days' sight note for the amount of \$5,743.63, which will be presented to you by the East River National Bank," I knew that said bank would present it because it was transacting all of the business of the Bank of Italy in New York. We never thought that the Bank of Italy was the one to collect the money. We

(Testimony of Francisco Romeo.)

were dealing with Mr. Mennillo, and he was going to collect the balance if the olives were of satisfactory quality. I knew that [54] the East River National Bank is the correspondent of the Bank of Italy, but not that it was interested. My dealings were with Mr. Mennillo, and Mr. Mennillo was the one who sold the goods to me and I intended to pay Mr. Mennillo if the quality of the goods was approved. It was quite natural to me to see that the East River National Bank was going to present that draft.

Further Recross-examination.

I met Mr. Mennillo at the Bank of Italy on May 2, 1919. I knew that he was banking with the Bank of Italy. I bought other shipments of olives from Mr. Mennillo, but they were all discounted by letter of credit. My firm opened a letter in my favor. I could not tell you with what bank in New York. They finally opened a credit with a different bank. When the credit with the bank was exhausted, they opened a credit with another bank.

Testimony of W. O. Johnson, for Defendant.

W. O. JOHNSON, a witness called on behalf of the defendant, was sworn and testified as follows:

Direct Examination.

I reside at Hollywood, California, and my place of business is Lindsay, California. I was in business at the latter place during the fall of 1918 and the spring of 1919, and was connected with Mr. Mennillo. I had charge of the shipping and packing

(Testimony of W. O. Johnson.)

of Mr. Mennillo's olive business throughout California. I am familiar with the two shipments of olives that were made on the 18th of April, 1918, and the 23d of April, 1919, the first of Greek Olives, and the second of Ripe Olives. They were shipped to the order of F. A. Mennillo, notify F. Romeo, N. Y. They were shipped in cars P. M. 41322 on the 18th of April, and Penna. 60237 [55] on the 23d of April. The one car is Greek and the other canned goods.

What you show me are the copies of the bills of lading.

Whereupon counsel for defendant offered in evidence the copies of the bills of lading. Counsel for plaintiff objected on the ground that they are immaterial, irrelevant and incompetent in so far as the Bank of Italy is concerned. Whereupon the Court overruled said objection to which ruling counsel for plaintiff duly *accepted* and said exception is here designated as

EXCEPTION NUMBER 9.

Bills of lading were marked Defendant's Exhibits "D" and "E," which are here to be inserted. Counsel for defendant then asked, "Was there a carload of olives shipped from Lindsay on May 9th to F. Romeo & Co. by F. A. Mennillo?" Counsel for plaintiff thereupon objected to said question on the ground that what may have happened on May 9th is absolutely immaterial, irrelevant and in-

(Testimony of W. O. Johnson.)

competent and not within the issues of this case. The Court thereupon overruled said objection to which ruling counsel for plaintiff duly *accepted* and said exception is here designated as

EXCEPTION NUMBER 10.

Continuing his testimony: There was a carload of olives shipped from Lindsay on May 9th, to Romeo & Company by F. A. Mennillo. The copy you hand me is a certified copy of the bill of lading under which that shipment was made. (Certified copy marked Defendant's Exhibit "F," which is to be here inserted.) I was in Lindsay during the months of March and April, 1919, and I never saw Mr. Romeo at Lindsay during that period. The processing of the olives that were shipped under these three bills of lading began in December and ended some time in April or May—about the 10th of April. As to the quality—they were what we call "seconds"; they were ungraded. As to the Greek Style Black [56] olives, they were what we call "tailings," the last end of the house. That means the cleaning up of the odds and ends and culls, and things of that kind. I knew that these were to be shipped to F. Romeo & Company under this contract. I did not say anything to Mr. Mennillo about shipping them, but sent samples of these to him in Los Angeles. The state of the market for California Greek Style Olives, during April, May and June of 1919 was fine. Up to Christmas,

(Testimony of W. O. Johnson.)

all of the year of 1919 was good. The market for California Ripe Olives was just as good; it was firm during all that year and until about February of 1920. The ripe olives covered by the bills of lading, canned olives, were ungraded. In this car in question the olives were mixed; medium were put into small, because the standards were running too many to the pound; they were running about 160, and we added a lot of standards to bring them down to 120; we understood that is what the contract called for. I have been in the olive business about 19 years and am familiar with the grading and processing of olives. During those years I have *keep* in touch with the market situation in regard to olives as well as in regard to the manufacture and processing of them. The Greek Style Olive is cured in dry salt and is black. It is black, that is, tree ripe when it is started to be cured and then it turns red and then turns black again. It must be absolutely ripe on the tree before you begin to cure it. About ten or twelve days after they start processing, the olive turns red and they turn black again about four or five days later.

Counsel for defendant then asked: "If when olives are supposed to be ready to ship, when they are received by a purchaser they are reddish yellow, are they in good condition?" A. "No."

Mr. FERRARI.—"We object to that."

(Testimony of W. O. Johnson.)

The COURT.—“There is evidence that these olives were yellow?”

Mr. GORRELL.—“Yes, there is in this deposition.”

The COURT.—“Answer the question.”

A. “No.”

Counsel for plaintiff duly excepted and said exception is here designated as

EXCEPTION NUMBER 11. [57]

If Greek Style Black Olives are received and are not black, they are not in good condition; they have been trying to make them of unripe fruit. You cannot make a California Greek Style Black Olive of unripe fruit. If you tried to do this, it would be hard and green and you could not get as good a price for it. The California canned, or ripe olive goes through a process of lye to extract the bitterness, what they call the “tannin,” and then it is preserved in salt and put in cans and hermetically sealed. California Ripe Olives are produced in California and some in Arizona, but nowhere else in this country. No canned olives are imported from abroad. When taken from the can, the California canned olive should be in color anywhere from a seal brown to a black, and should be firm; if it is soft, it is poorly packed, not properly graded. I was present at Lindsay when Mr. Mennillo came with Mr. and Mrs. Romeo in December, 1918, and I saw them there at that time. I also saw them the

(Testimony of W. O. Johnson.)

second time they came back from San Francisco. They were looking at olives in bins or tanks. By examining the olives in December, when Mr. Romeo was there, nobody could tell what the condition of the olives would be when they were through with the processing. Olives are graded with reference to size either when they first come into the house or after they are cured, generally when they first come in. Many times they come in so fast they cannot grade them all at that time; we have to wait until we pack them to grade them.

Cross-examination.

I left the employ of Mr. Mennillo I believe about March or April of 1920. I have nothing against Mr. Mennillo; I am just as friendly to him as I am to anybody. As far as I personally am concerned, I am on friendly terms with Mr. Mennillo. I have had letters from him, and very pleasant letters, since I left Mr. Mennillo's service, but I have none of these letters with me; I [58] tear them up. The olives mature and are ready for packing anywhere from November to May; they were picked as late as May this year. The time is from the first of November until probably the 15th of February. The last of the olives that were shipped in May in the instant case came in the early part of January. It would be difficult to say what proportion came in in the early part of January because we

(Testimony of W. O. Johnson.)

were shipping olives to other concerns as they were cured, pickled and canned. The olives that were finally shipped in May were in the establishment in Lindsay as early as December. We had a very small plant there and could only can about 1,000 or 1,200 gallons a day and we had to hold them sometimes two or three weeks to make a car. Some of the olives that were actually shipped in April, 1919, had been in the establishment in the state of processing as early as December, 1918, but not all of them; I could not tell what proportion of them. I was not foreman of the plant; I had charge of the office and had charge of the business of the firm. I had a processor there by the name of Daniels and we had a superintendent, a Mr. Boyce. I supervised the general work of the plant and all other plants of Mr. Mennillo. I stayed at Lindsay during all the packing because the crop was short in other parts of the State and it was not necessary that I go elsewhere; I probably left there two or three times during the season for two or three days. This particular shipment was not graded; none of the standard or medium olives were graded at any time. The condition in which they were during the processing was not necessarily the condition in which they were shipped. We took out some of the best of them and made up cars and shipped them; the balance we shipped to Mr. Romeo. Mr. Boyce did this at Mr. Mennillo's instructions. I was su-

(Testimony of W. O. Johnson.)

pervising the plant and objected to it very strenuously. I notified Mr. F. A. Mennillo and his brother, Mr. C. R. Mennillo, but I did not notify Romeo & Co. [59] I never saw Mr. Romeo there to examine any olives, although I saw him at the plant. I could not tell, at that time, whether or not the olives complied with the contract; they were in the course of processing, and no man can tell at that time. When you pick the olive off the tree, I do not think you can tell whether it is a good olive or bad one, or whether or not it is going to process; I have never been able to tell. When you begin processing, you can tell what the result is going to be with proper treatment. These olives, unfortunately, did not get proper treatment; I was supervising them and it was my business to see that they did get proper treatment. I saw Mr. Romeo at the plant on two occasions; I accompanied Mr. Mennillo and Mr. Romeo through the plant; what there was to see. I do not know whether I showed him the olives. I showed him the whole plant and he must have seen everything that was in the plant; I did not cover up the olives. I was with them from the time they came into the office, while they went through the plant, and until they went back into the office. That was on the first trip. On the second occasion, Mr. Romeo did not go into the plant; he did not go out of the office. The only conversation I had with Mr. Romeo or his

(Testimony of W. O. Johnson.)

attorneys about my testimony in this case was about the bills of lading; they asked me if I could get copies at Lindsay and I told them that I thought I could. We said nothing else. I did not know what was going to be asked me when I came on this stand any more that I know what you are going to ask me. I have never discussed these matters with Mr. Romeo or his attorneys. I am associated with the American Olive Company. I am associated with the Lindsay Ripe Olive Company, a firm of olive growers. They are not successors to Mr. Mennillo; they use the same plant; I am interested in the profits of the firm. [60]

Redirect Examination.

When I said "the reason the process was not properly done was as follows," I had a process of my own that I had used for fifteen years; that is why I went with Mr. Mennillo—for the curing of the olives, and then I had a process that I had gotten from Greece for Greek Olives and I had shown this to Mr. Mennillo and it was on the grounds of these two processes that I left the American Olive Company and went with him. After I had gotten started, he had five houses and five processes, and every man wanted to use the process that they used previously, and I had a contract with Mr. Mennillo, and I just simply sat there, and did all I could do, and waited until the contract terminated. The olives at Lindsay were not processed the way I wanted them.

Testimony of T. E. Foster, for Defendant.

Mr. T. E. FOSTER, a witness called on behalf of the defendant, was sworn and testified as follows:

Direct Examination.

I reside at San Francisco, and I have been managing an olive plant. I have been engaged in the purchase and sale of olives for about five years and have been familiar with the price of olives. In May and June of 1919 the olive market was fairly good; the olive market did not weaken during these months to the best of my recollection. The market for Greek Style Black Olives during that year was the best it has ever been and remained that way until the following year; the market during the year 1919 California Black Olives in cans, ripe olives, was very good, remained good until the bottleanos scare, the poison scare, occurred, if I remember correctly, in October, 1919. Until that time the condition of the olive market for California Ripe Olives in cans was strong. The California Greek Style Olives are [61] generally packed in barrels. When packed for shipment they should be all black; they should resemble the appearance of dried prunes. If reddish or yellow, they would be considered off quality. You are supposed to get the top price for ripe olives. California Ripe Olives, when canned, should be black and of a firm texture; if off, they are not considered

(Testimony of T. E. Foster.)

high quality olives. As to how much salt there should be in the barrels of California Greek Style Black Olives, that is a matter of opinion; some pack them without salt and some pack them with salt. The salt does not really hurt the olives, except that whoever buys them pays extra freight on them; the olives are generally weighed into the barrel, net weight, and then salt added afterwards. Whether or not a man is paying for something he did not get when he buys black olives, California Greek Style Black Olives, and finds a lot of salt in the bottom of the barrel, all depends upon whether or not the sale is based on the net weight of the olives. I was packing olives myself until September, 1919. During the years 1918 and 1919, the concern I represent here on the coast had prices ranging from around 21¢ to 28¢ per pound. That was anywhere from January until May, 1919. I am also familiar with the contracts later in the year 1919. The firm I represent had a contract for olives in which they agreed to purchase all the olives from the Olive Growers' Association at the price of \$135.00 per ton, and we resold them in September, 1919, for \$15.00 a ton advance.

Cross-examination.

I am connected with the Pacific Coast Mercantile Company, and have been with them since August, 1918. They lease a plant. I have nothing to do

(Testimony of T. E. Foster.)

with the actual processing, except that everything is done under instructions from the office. I have no list or anything else in the office which would show what the market was during May and June, 1919, because they are all back [62] in the Head Office in Boston. I have not looked at these lists recently. It was generally known at that time, everybody knew, that these months were supposed to be the best months as to price of California Olives. At that time there was a publication showing the market price of these olives, but I have none of those lists with me, nor have I consulted any of those lists before giving this testimony.

Redirect Examination.

I gave my testimony from being familiar with conditions. May and June, 1919, were not particularly the best months in the olive industry, but during those months, all during the spring, and up till around May, the market was considered very firm. I have no recollection of the market beginning to drop in May. In September we sold the Greek product for \$15.00 a ton, and this would be indicative of the conditions of the market. The packers could not pay more money for the olives unless the market would permit it; that would indicate that the market was stronger.

Recross-examination

The market during the summer months of 1919

(Testimony of T. E. Foster.)

was one of the best markets California has ever had. This high mark extended anywhere from December, 1918, to May, 1919. I do not say any particular date; it might have been June, but those were the best months. After that it did not taper off to any degree. I did not include the other months in stating the best period of the market because after June, July and August it is generally open season; there is nothing doing because the new crop does not come in until October and November—they are practically the slack months of the year. Those were the best months as to market conditions and though it continued good until September and October, that is the new crop. [63]

Testimony of Mrs. Marie J. Romeo, for Defendants.

Mrs. M. J. ROMEO, a witness called on behalf of the defendants, was duly sworn and testified as follows:

Direct Examination.

I live in New York City. I was in Los Angeles during the fall of 1918 and winter of 1919, and accompanied my husband wherever he went during that time; I always do on account of his poor health. I am the wife of the defendant, F. Romeo. I accompanied Mr. Romeo and Mr. Mennillo on the automobile trip to Lindsay in December, 1918. We went to the olive plant; then to San Francisco, by automobile and then back to Los Angeles. On no

(Testimony of Mrs. Marie J. Romeo.)

other occasion was I ever at the Lindsay plant with Mr. Romeo. I went to other plants of Mr. Mennillo with Mr. Romeo, but never to Lindsay plant again except in December, 1918. During the months of April and May, 1919, I was with Mr. Romeo in Los Angeles. I was present at all conversations between Mr. Romeo and Mr. Mennillo in April, 1919, with reference to the draft. A conversation took place at the Clark Hotel, Los Angeles, concerning which the defendant put the question: "What was the conversation as well as you can remember?" Counsel for plaintiff thereupon objected to said question. The Court thereupon overruled said objection, whereupon counsel for plaintiff duly excepted, and said exception is here designated as

EXCEPTION NUMBER 12.

I usually listen to arrangements made between my husband and his business friends, although I seldom take part in the conversation; I just listen. I am not a very good business woman. I heard Mr. Mennillo say that he had shipped the cars and Mr. Romeo said that he had not examined the goods; that he could not pay in full as he did with the other shipments because the other shipments did not prove satisfactory, and he offered 50% of this [64] shipment. Mr. Mennillo said that that would be all right and Mr. Romeo said that he would not give him more than 50%; after some discussion they came to an agreement that Mr. Romeo would

(Testimony of Mrs. Marie J. Romeo.)

pay 60% of the invoice and the bill would be paid by Mr. Mennillo; that the firm would pay Mr. Mennillo the balance in New York after approval and examination of the goods. The \$8,000.00 was to be paid by the Bankers Commercial Letter of Credit to be opened in the name of my husband. The balance was to be a 60 day sight draft, to be accepted at the New York office after examination and approval of the goods. I was at the Bank of Italy on the 2d day of May, 1919. I fixed that date because it was my birthday and my husband brought me a bouquet of red roses. I could not say that I heard the conversation that there took place. I knew what I was there for and I very likely heard it because I am not deaf altogether, but I do not remember positively. I guess I sat about this distance (indicating) from Mr. Moore's desk; I could not say that I paid particular attention to the conversation; it is hard to tell what was said, I don't know. I did not know I was going to be put in this chair to report it and I did not pay any particular attention; I knew what we went there for. I had been at the bank several times previously with Mr. Romeo and on each occasion it was for the transaction of the same kind of business—the taking up of letters of credit for other shipments of different kinds of goods.

Deposition of Giovanni F. Romeo, for Defendant.

GIOVANNI F. ROMEO, a witness called on behalf of the defendant, having been first duly sworn before the Commissioner, testified in his deposition as follows:

I live at No. 125 Prospect Park, West, Brooklyn, New York. I am a Director and Vice-President of the defendant F. Romeo & Co., [65] and have been connected with them for sixteen years; their business is importing, wholesale, jobbing and manufacturing of food products. During that entire period we have handled olives. We handled California Olives during 1917, I believe, but surely during the period of 1919 and 1920. During the 16 years with this firm, I have been everything from office boy up. In the beginning I did lots of small jobs about the office and later on my position grew to be more responsible and I bought goods and sold them. I have been buying and selling olives practically during the whole period. I have also sampled and examined them. Mr. Francis Romeo is my father; he has been in the olive business for thirty-seven years. I gained my knowledge of the olive business from my father and from being in constant touch and association with people in that line. I could not say offhand how many olives our Company handled on an average during the years 1910 to 1919. As I remember it, we always handled them in large quantities, at least anywhere from

(Deposition of Giovanni F. Romeo.)

500 barrels in the beginning; as it grew, we handled larger quantities. We handled Greek, Black and Ripe Olives. Sicily Green Olives and California Greek Style Olives. The California Greek Style Olives are black ripe olives cured in the Greek style; that is, they are pickled after the olives are ripe and cured and packed in brine. There is very little difference between the Greek Style Olive and the Greek Olive. It is practically merely a question of where they are grown. The California Ripe Olive is not packed in brine; it is simply packed in water and cured differently. Generally they are packed, for the Italian trade, in water; in cans of one gallon, commonly known as Number 12 cans, and sealed; they are packed one-half dozen to the case. The Greek Style Olives are generally packed in barrels 200 to 300 pounds, not in brine; only a slight quantity of brine. These barrels can be opened without [66] injury to the olives. When the cans of ripe olives are opened, the olives will keep for three or four weeks if covered with water; they can be resealed without damage to the olives, but I believe it will be necessary to use a new can. I remember a shipment of Greek Style Olives from Mr. F. A. Menillo shipped on April 18, 1919, arriving in New York subsequent to that date. They arrived in New York about May 21st. Defendant's Exhibit "K" is a copy of the invoices under which these olives arrived. I remember a shipment of a carload

(Deposition of Giovanni F. Romeo.)

of ripe olives from Mr. F. A. Mennillo shipped April 23, 1919, which arrived in New York some-time subsequent to that date. They arrived the same date as the carload of Greek Olives. Defendant's Exhibit "L" is a copy of the invoice under which this carload was shipped. I learned of the arrival of these olives as soon as they were in the store; that is, within a day or so after they arrived in New York. I examined the Greek Style Olives the same date they were brought to our store. Mr. Italiano and, I believe, Mr. Longo, were with me when I examined these olives. I went down stairs; had them open about eight or ten barrels which had not been previously opened, and examined the quality. I put my hand into the barrels, drew out the olives and looked at them carefully. I also looked at all the barrels that had been opened, that is about eight or ten. I tasted the olives from all of these barrels. Some tasted very salty, others had a bad taste owing to their being so soft. I found also that the olives were ungraded, that is, different sizes of olives were in the same barrel, small and medium were mixed. Defendant's Exhibit "K" calls for Standard and Medium Olives. "Standard" is the same as small. Having these two grades of olives mixed in the same barrel lowers the price which one can obtain for them. Besides being ungraded, I [67] found that these olives were soft, reddish in color, and generally of a poor

(Deposition of Giovanni F. Romeo.)

quality; they were packed in an excessive quantity of salt. Greek Style Olives should be black; a reddish color indicates that the olives have not been properly cured and that they were probably taken from the ground instead of being picked from the tree. The effect of these facts upon the sale of the olive is this: the trade knows that a reddish olive is generally soft, and naturally they have to be sold at a lower price. Greek Style Olives in good condition are firm. There was an excessive quantity of salt in the barrel. I put my hand in the barrel and could have taken out a handful of salt in almost any part of the barrel, with very few olives in it—salt alone or salt with very few olives in it. The olives I took out of the barrels had salt all around them. Prior to this shipment, I had examined at least a dozen other shipments of Greek Style Olives. In all the other cases there was just enough salt to properly preserve the olives. Instead of coarse ice-cream salt, a finer salt is used and this disappears within a short time when there is a regular quantity put in. On other occasions there has been no residue left after the removal of the olives—nothing but a small quantity of brine. In the barrels shipped under Defendant's Exhibit "K," there was an excessive quantity of brine, it varied. Some barrels contained one gallon, some barrels contained as high as four gallons. There was nothing else as to the condition of these olives

(Deposition of Giovanni F. Romeo.)
covered by Exhibit "K." I made the customary trade inspection of the Greek Style Olives. On the same day I also examined the shipment of ripe olives covered by Defendant's Exhibit "L." I had the store man take one can from half a dozen different cases, bring them upstairs to the office, and I opened the cans and examined the olives. I examined [68] the olives in each of these half dozen cans. Then I took a handful of olives and pressed them gently together to see how far they would resist pressure, and noted that there were a number of soft ones and also discolored olives in the cans. I handled a good number of olives in each can separately to see how firm or how soft each one was, and found that there was quite a large percentage of soft ones in each can as well as discolored ones. I also tasted them. The taste of the soft olive was good; it was different from that of the olives which were firm. Prior to this occasion, I had examined and inspected at least fifteen or twenty other shipments of California ripe olives. I made the customary trade inspection of these ripe olives. California Ripe Olives, in good condition, should be black, firm and the water should be clear. In the olives shipped under Defendant's Exhibit "L," the water was not clear; it was brownish in color. I again examined the Greek Style Olives at different intervals when I showed them to customers or brokers. On these other

(Deposition of Giovanni F. Romeo.)

occasions I found the same condition upon examination. I made other examinations of the ripe olives than the one to which I have just testified. These I made in showing them to brokers or customers and I found the condition to be the same upon each examination. The Greek Style Olives were not of good quality and condition and were unfit for human consumption. The ripe olives in the shipment covered by Defendant's Exhibit "L" were not of good quality and condition, and were not fit for human consumption. The Greek Style Olives under Exhibit "K" were not marketable as olives of good quality and condition. The ripe olives under Exhibit "L" were not marketable as olives of good quality and condition. The condition of the Greek Style Olives decreased their market value and they had to be sold at a lower price. The condition of the ripe [69] olives decreased their market value; I have no facts at hand showing the amount of this decrease. I remember another shipment of ripe olives from Mr. Mennillo shipped by him on or about May 9, 1919, to Romeo & Company. Defendant's Exhibit "N" for identification is an invoice covering that shipment. That carload arrived during the early part of June, I believe. I made an examination of that carload upon arrival and found the olives to be in the same condition as the previous car of ripe olives. The olives covered by Exhibits "N" and "L" are

(Deposition of Giovanni F. Romeo.)

the same size and style of olives. After arrival, the carload of ripe olives covered by Defendant's Exhibit "L" was set aside, that is they were placed in one corner of the warehouse and orders were given that they were not to be sold until instructions from the office. The same was done with the olives shipped under Exhibit "N." By that I mean that they were set aside and orders were given that they be not sold until instructions were issued to that effect, and they were so set aside. The olives under Exhibits "L" and "N" were commingled and there were no identifying marks whereby we could subsequently tell the olives of one shipment from those of another. These olives were subsequently sold and we kept a separate account of these two lots; it would have been very difficult to keep these two accounts separate because of the limited space in the store. In selling the ripe olives, we could not tell whether they were from Exhibit "L" or Exhibit "N." Some time in August or September, I cannot say exactly, one day I happened to be at the East River National Bank and there saw the original draft as set out in paragraph five of this complaint. I had no previous knowledge that the East River National Bank held this draft. I first learned that they had it when Mr. Lodato told me that the Bank [70] had presented for acceptance and had refused to accept this draft as we had previously agreed to do. I

(Deposition of Giovanni F. Romeo.)

cannot say exactly when this was, but it was after the receipt of the two carloads of olives—Exhibits “K” and “L.” I was not present at the time this draft was presented for acceptance. Francis Romeo, the president of the company, was in California. Mr. Lodato, Mr. Italiano and I were at the firm’s office. We always discuss matters of importance together before taking any action. There were seven directors of the firm, I believe, including Mr. Pica, Mr. Dassari and Mrs. Romeo. At that time Mr. Dassaro was an engineer with the New York Telephone Company. Mr. Pica was in the office part of the time and on the road the remainder of the time. I cannot say positively that there was a meeting of a quorum, that is four of the directors, at any time to take up the question of acceptance or nonacceptance of this draft. However, Mr. Lodato, Mr. Italiano and I, after examining the olives upon arrival, decided that owing to their bad condition we would not accept the draft drawn by Mr. Mennillo for the balance. I was in charge of the New York office during the absence of the President in California. We have never been paid any part of the damage suffered by reason of the fact that the olives covered by Exhibits “K” and “L” were not up to standard. I am acquainted with the contract made between Mr. Mennillo and our company calling for the shipment of certain olives during the year 1919, but I do not

(Deposition of Giovanni F. Romeo.)

remember what that contract provided for as to the condition and quantity of the olives to be shipped under it.

An adjournment of court was then taken until Tuesday, June 21st, 1921, at ten o'clock A. M. [71]

On Tuesday morning, June 21st, 1921, at ten o'clock A. M., the trial of this case was continued and the following proceedings were had:

Counsel for plaintiff thereupon introduced the following testimony from the cross-examination of the deposition of G. F. Romeo, taken on behalf of the defendant, wherein said witness testified as follows:

Cross-examination.

My duties with F. Romeo & Company are the general management of the business, buying goods, selling them and financing them. I examine all goods purchased by Romeo & Company. I do not remember how many carloads of Greek or ripe olives were purchased by Romeo & Company in 1919.

Francis Romeo is my father. He is President of F. Romeo & Company. In the fall of 1918 and the winter of 1919 he was in California for his health, and for his health alone. While there he transacted no business for Romeo & Company. While he was in California we consulted with him at different times about matters of business for F.

(Deposition of Giovanni F. Romeo.)

Romeo & Company in New York and in California. Francis Romeo examined goods purchased by Romeo & Company in California for said company. He cashed a letter of credit issued in his name by Romeo & Company, and I presume he paid the proceeds to Mennillo.

Francis Romeo arranged the draft referred to in the fifth paragraph of the complaint in this suit. While in California, Francis Romeo did whatever he was instructed to do by the New York office, following the consultations above referred to.

I remember a contract executed between Romeo & Company and Mennillo & Company for the shipment of olives during 1918 and 1919. I do not recollect who signed or executed that contract on behalf of Romeo & Company. The contract is in California, I imagine. I do not know if two people signed that contract for our firm. I am a Director of F. Romeo & Company. The olives purchased under the contract were to be inspected in California by our [72] representative. We chose as that representative, Mr. Francis Romeo, who is now in California.

The olives covered by invoices, Defendant's Exhibits "K" and "L" arrived in New York on, or about, May 21st, 1919. I remember the date from the records, that is from the date we paid the freight and the date of the arrival notice. May 21st is

(Deposition of Giovanni F. Romeo.)

the approximate date of the arrival of the olives at the railroad station. I fixed the date of the arrival of the olives at our store, or warehouse, because I know we withdrew them as soon as they arrived. I remember this. The olives were first examined by me on the date they were withdrawn from the pier. I opened eight (8) or ten (10) barrels of Greek olives not previously opened by Mr. Italiano and Mr. Lodato. They opened and examined some barrels in the store before I did. When I came to the office on the day of the arrival of these olives and was informed that they had arrived, I immediately examined them. I could not say what time of the day; it was the afternoon I imagine. Mr. Lodato and Mr. Italiano had opened some barrels before I arrived at the store.

I do not remember whether or not the Board of Directors of Romeo & Company by resolution authorized Mr. Lodato to refuse to accept the draft set forth in paragraph fifth of the complaint. Our firm keeps a record of the drafts which we accept when presented for payment. We keep no record of the drafts we reject. I understand that the olives for which the letter of credit for Eight Thousand (\$8,000) Dollars was issued, and the draft for Five Thousand Seven Hundred Forty-three Dollars and Sixty-three (\$5,743.63) Cents was drawn, are the olives referred to in Defendant's Exhibits "K" and "L." My first knowledge that

(Deposition of Giovanni F. Romeo.)

this draft had been presented to Romeo & Company for payment was after the olives had arrived. I could not say definitely how long after; it was quite some time. I first saw the draft in August or September, 1919. I was in charge of the affairs of Romeo & Company while Francis Romeo was in California. The draft may have been presented to the firm while I was not there.

We had agreed that it was not to be accepted; we, meaning [73] all of us in New York, together with Mr. Romeo in California; all of us in New York, that is, Mr. Lodato, Mr. Italiano, myself and Mr. Francis Romeo.

As to the authority of the three parties mentioned to decide not to honor the draft: we were in full charge of the business and took the step after due consultation between ourselves and Mr. Romeo in California.

I do not remember what quantity of olives were to be purchased by Romeo & Company from Menillo & Company under this contract. The olives covered by invoices, Defendant's Exhibits "K" and "L" were a modification of this contract. That modification was made by Francis Romeo. He was conducting the business for Romeo & Company in California during 1918 and 1919, after consultation with us. He conducted this business only upon our authority to do so. He conducted only such business as he was authorized to do. I do not re-

(Deposition of Giovanni F. Romeo.)

member whether Romeo & Company authorized Francis Romeo to conduct business for them in California during 1918 and 1919, that is, I do not know whether there had been any official ruling by the Board of Directors to that effect. I believe we had some correspondence to the effect that Romeo & Company issued a letter of credit to Francis Romeo, its President, in California, for Eight Thousand (\$8,000) Dollars, in part payment of the olives covered by invoices, Defendant's Exhibits "K" and "L," and that Francis Romeo arranged with Mennillo & Company, at the request of Romeo & Company, the draft set forth in plaintiff's complaint under paragraph fifth. If Mr. Romeo arranged for the draft set forth in paragraph fifth of plaintiff's complaint and made the modifications of which I speak, he was authorized so to do by Romeo & Co.

Francis Romeo was authorized to transact some business for Romeo & Company in California in 1918 and 1919. The contract already existed when he made the modifications of which I speak. It was not a separate agreement of purchase.

I believe there is a letter from Mr. Romeo to Mr. Mennillo, showing the modifications. I believe this letter is on the Coast, but possibly it is here. The letter you hand me is the one to which I refer. [74] Part of the modification is therein laid out; the balance of the modification is constituted by

(Deposition of Giovanni F. Romeo.)

the final terms as agreed, which were that we were to advance an Eight Thousand (\$8,000) Dollar letter of credit, and that the balance would be paid by a draft at sixty days sight, drawn by Mennillo & Company on us to be accepted by us after having examined and approved the quality.

Besides Exhibit "A," we have our application to the East River National Bank for Eight Thousand (\$8,000) Dollars to show the balance of the modification. A contract was executed between Romeo & Company and Mennillo & Company and I claim that a modification was made of that contract; I submit a letter, Defendant's Exhibit "A" to show part of the arrangement for the modification. Our various wires and correspondence with Mennillo & Company protesting the olives, after they had arrived, and had been examined by us, further tend to show that modification. From the letters and telegrams marked Exhibits "A" to "V" a modification of that contract between our firm and Mennillo is shown in Exhibit "A"—a letter of Francis Romeo to F. A. Mennillo, dated April 22d, 1919; Exhibit "B," telegram from F. Romeo & Co. to F. A. Mennillo, dated May 23d; Exhibit "D," telegram from Romeo & Company to Mennillo & Company, dated June 4th; Exhibit "G," telegram from Romeo & Company to F. A. Mennillo, dated June 13th; Exhibit "H," letter from Romeo & Company to Mennillo & Company, dated July 9th; Exhibit

(Deposition of Giovanni F. Romeo.)

“M,” telegram from Romeo & Company to Mennillo & Company, dated July 9th; Exhibit “O,” copy of letter of credit, drawn in favor of F. Romeo, dated April 29th, for Eight Thousand (\$8,000) Dollars; Exhibit “P,” telegram from F. Romeo in Los Angeles, to F. Romeo & Co. in New York, and Exhibit “Q,” telegram from F. Romeo & Company to F. Romeo, dated April 29th.

The above exhibits, I claim, show a modification of the agreement, or contract, between Mennillo & Company and F. Romeo & Company.

Exhibit “E” convinces me my understanding of the modification. It reads as follows: “Los Angeles, California, June 5th, 1919, to F. Romeo & Company, New York. Careful consideration of your telegram and careful examination of samples, duplicate of goods sent you, convinces me my [75] standing as per my letter of May 29th absolute correct. Signed F. A. Mennillo.”

Besides Defendant’s Exhibit “C,” showing a modification of this contract, we have his signature on the draft. There may be some other writing in California showing an agreement by Mennillo & Company to modify this contract, but I know of none in New York.

The olives I referred to as tasting very salty were the olives in the barrel. The condition of the Greek olives may have been due to the fact that they were taken from the ground instead of being picked from

(Deposition of Giovanni F. Romeo.)

the tree, or again, that they had been picked when over-ripe.

The customary trade inspection of Greek olives is from 5 to 10 per cent; it is not definite.

The olives shipped under invoices, Defendant's Exhibits "K" and "L," were withdrawn from the railroad station because we did not reject them until after such withdrawal. They were withdrawn for the purpose of inspection. While remaining in our possession, these olives were shown to the customers and to brokers in the trade for the purpose of selling them. For examination, the store man withdrew one can, each, of six different cases. 1043 cases of ripe olives were shipped under this invoice; 5 per cent of that would be 50. In this instance, we made the customary trade inspection because there were also a large number of cans that had been opened the same day by Mr. Italiano and Mr. Lodato. These were on the sample table and I examined them. I examined six (6) cans of the ones that I had opened, and in addition to that, I also saw the olives in the cans that had been opened by Mr. Lodato.

I believe Romeo & Company bought other olives during the year 1919 besides those mentioned in this contract. I do not remember how many carloads. I have no idea what quantity of olives were bought during 1919. Those bought by our firm were stored in our warehouse at 374 Washington Street, New York. That is where our offices are situated.

I do not remember whether Mennillo's olives,

(Deposition of Giovanni F. Romeo.)

both ripe and [76] Greek, were the only olives in our warehouse in May 1919. I was present when the store man went thru the cans.

During the sixteen years I have been connected with Romeo & Company, I have examined ripe olives for the purpose of purchasing them, at least, 15 or 20 times. It may be more, but not less. I examine all goods purchased by Romeo & Company.

Romeo & Company have bought, at least, 15 or 20 consignments of ripe olives in the past 16 years. We bought maybe 30 or 40 more.

If I remember correctly, the second examination was made of the Greek style and ripe olives the next day. I examined both kinds at least a dozen times when they were in the possession of our firm. These examinations were made at various dates after their arrival, approximately, May, June, July, August, probably September, and maybe after that. That is as far as my memory goes.

The draft was presented to Mr. Lodato. I cannot recollect the date. I do not believe Romeo & Company have any record of it. We refused to accept the draft because the olives were not as contracted for.

I before stated that while Francis Romeo was in California, he was authorized to transact just such business as Romeo & Company specified. Generally, when Mr. Romeo was authorized to do anything, it was after a consultation held previously between Mr. Italiano, Mr. Lodato and myself. Francis Romeo, the president of Romeo & Company, only

(Deposition of Giovanni F. Romeo.)

transacted such business as I, as Vice-president, and Mr. Lodato as Secretary and Treasurer, consulted and agreed upon, because this was the office and place of business. Mr. Lodato and I are giving the business our direction and attention and are in constant touch with the matters and, therefore, are naturally fully acquainted with things pertaining to the business and are in a better position to judge as to what decisions to make. Mr. Romeo always consulted with us before taking any important steps, as we are directing the business here.

The by-laws state that Mr. Francis Romeo cannot sign any draft acceptances, or any documents, without the additional signatures of [77] either myself or Mr. Lodato. The by-laws state definitely what he is allowed to do.

We generally consult together when a deal of importance is involved before purchasing the goods.

In a sub-section of the By-laws, Article 3, Officers, Section 4 of Subdivision "F," it is laid out that the president shall "make and sign all contracts and agreements and see that they are properly carried out."

Under subdivision "F," Francis Romeo can make and sign all contracts and agreements and see that they are properly carried out. I do not know if this means contracts for the purchase and sale of goods. Romeo & Company is engaged in no other business than the importation and manufacture and sale of food stuffs and other food products.

I am a director of Romeo & Company and I have

(Deposition of Giovanni F. Romeo.)

read the By-laws. I do not know whether sub-section "F" refers particularly to goods or not, but I imagine it does.

When Mr. Lodato and I refused to accept the draft set forth in this complaint, we were directed so to do by the Board of Directors of Romeo & Company, but not in writing. It was not at a regular meeting of the Board of Directors. In saying we were directed by the Board of Directors, I mean that Mr. Lodato, Mr. Italiano and myself consulted together regarding the matter; we consulted with Francis Romeo on the Coast regarding it and came to the conclusion that we should not accept the draft because of the bad quality of the goods covered in part by it.

The face amount of the draft set forth in paragraph fifth of plaintiff's complaint does not represent the balance due for the goods shipped under invoices, Defendant's Exhibits "K" and "L." The total agreed purchase price under these two exhibits was \$13,743.63. Eight Thousand (\$8,000) Dollars was paid by letter of credit on account. The \$5,743.63, face value of the draft, represents the amount we were to pay, providing, we found the quality satisfactory. [78]

The olives arrived in New York before the draft was presented to our firm for acceptance. The draft in question was presented before maturity.

We did not return to Menillo & Company the olives covered by Defendant's Exhibits "K" and "L." We

(Deposition of Giovanni F. Romeo.)

held them subject to his order, as per our telegrams and correspondence. We have no letter or telegram in New York from Mennillo stating that he would agree to our holding them for his order. Any such letter or telegram would be in California.

The olives were withdrawn from the warehouse on, or about, the 22d day of May, 1919. We forwarded notice of rejection to Mennillo & Company, by telegram' the day we examined the olives. On May 23d we notified him of the condition of the olives; May 25th we received his answer, Exhibit "C," stating that his brother would call on us, and on June 4th, Exhibit "D," we rejected the olives and asked disposition of them. The first notice of rejection was the telegram, Defendant's Exhibit "B." The olives referred to by Defendant's Exhibits "K" and "L" remained in the possession of Romeo & Co. until the day of their sale by Romeo & Company.

I believe Francis Romeo will remain in California for the trial of this action.

The olives shipped under Defendant's Exhibit "K" and "L" were not of the same general quality as the olives previously accepted by Romeo & Company in shipments from Mennillo & Company. The market for olives were strong from May 1st, 1919, to January 1st, 1920; no Greek olives were coming. The market decreased for neither Greek style nor ripe olives.

Redirect Examination.

The paper I have here contains the minutes of the

(Deposition of Giovanni F. Romeo.)

Special Meeting of the Board of Directors of F. Romeo & Company, Incorporated, held February 9th, 1917. They are kept in the regular Minute Book of the Company. They then are read into the records.

The following minutes from the meeting of February 9th, 1917, pages 74 and 75: [79]

“Mr. Fred F. Romeo makes a motion that all the officers for the time just expired, be confirmed for this year. Mr. Francesco Romeo says that he appreciates the motion of Mr. Fred F. Romeo and is thankful for it, but he cannot accept the office of president; first on account of his poor health, he is unable to comply with the duties, and for the welfare of the company he deems it advisable to elect Giovanni F. Romeo to the presidency.

“Mr. Giovanni F. Romeo is grateful to Mr. Francis Romeo for the honor the latter would confer on him, but he emphatically declares that, under no circumstances, would he accept the office of president. He appreciates the reasons expressed by Mr. Francis Romeo but he avers that even without taking an active part in the management of the business, the name of Mr. Francis Romeo as president is in itself a great factor in the welfare of our company. On the other hand, he adds, that in order to induce Mr. Francis Romeo to accept the office of president he promises that if re-elected vice-president he will continue to take charge of the general management of the business.

(Deposition of Giovanni F. Romeo.)

“All directors insisting that Mr. Francis Romeo accept the office of president, he states that he will accept, if elected, provided, that the active work connected with the duties of his office be performed by the vice-president.”

I have here the minutes of the special meeting of the Board of Directors, held July 23d, 1917, which read as follows:

“The following resolution was unanimously adopted: resolved that a meeting of three (3) officers of this company, the vice-president, the secretary and assistant treasurer, be held twice a week on Tuesdays and Fridays in order to discuss all current important business matters, and that no purchase of an amount over One Thousand (\$1,000) Dollars be made unless approved by a majority at one of said meetings. Records of said meetings to be kept in a separate book. This resolution to be in force from August 7th, next.”

I have not the special book here referred to. I believe Mr. Italiano did keep such a book somewhere; it may be in the office. I do not [80] remember if there is any record in said book of the draft here in question; there may be.

From August 7th, 1917, the resolution I have just read was in full force, and has never since been rescinded by the Board of Directors.

I wish to correct a statement made this morning that the draft in the suit here represents the balance due on the shipment under Defendant's Exhibits

(Deposition of Giovanni F. Romeo.)

“K” and “L.” I wish to state that it was a balance due, provided, the olives arrived in a satisfactory condition.

When I said the draft was presented before maturity, I meant it was presented for acceptance, and of course it could not be due until it was accepted, as it was a 60-day sight draft.

It was here stipulated between Herbert D. Cohen and John Glynn, the attorneys for the respective parties in the taking of the deposition, that the minute book of Romeo & Company contained no authorization, or direction, with reference to the refusal of acceptance, or the acceptance of the draft set forth in paragraph fifth of the Plaintiff's Complaint.

At this point it was stipulated between counsel for plaintiff and for the defendant herein, that the portions of the deposition of Mr. Lodato not read are substantially the same as those of Mr. Romeo that have just been put in evidence.

Counsel for defendant thereupon introduced and offered in evidence the following exhibits: A letter from Francis Romeo to F. A. Mennillo, dated Los Angeles, California, April 22d, 1919, marked Defendant's Exhibit “A”—for identification; a telegram from F. Romeo & Company to F. A. Mennillo, dated Los Angeles, May 23d, 1919, marked Defendant's Exhibit “B”—for identification; a telegram from F. A. Mennillo to F. Romeo & Co., dated Los Angeles, California, May 24, 1919, marked Defendant's Exhibit “C”—for identification; telegram from F. Romeo & Company to F. A. Mennillo, dated June

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4th, 1919, marked Defendant's Exhibit "D"—for identification; a telegram from F. A. Mennillo to F. Romeo & Company, dated Los Angeles, California, June 5th, 1919, marked Defendant's Exhibit "E"—for identification; telegram from F. Romeo & Company [81] to F. A. Mennillo, dated June 10, 1919, marked Defendant's Exhibit "F"—for identification; telegram from F. Romeo & Company to F. A. Mennillo, dated June 13, 1919, marked Defendant's Exhibit "G"—for identification; telegram from Romeo & Company to Mennillo & Company, dated July 9th, 1919, marked Defendant's Exhibit "H"—for identification; telegram to F. Romeo & Company from Mr. Mennillo, dated July 10th, marked Defendant's Exhibit "I"—for identification; a letter from Mennillo & Company to Romeo & Company, dated July 16th, 1919.

Counsel for defendant thereupon read into the record the following abstract from the By-laws of F. Romeo & Company, pages 18-19, section 6, relative to the duties of the Treasurer:

"The Treasurer shall (b): He shall, with either the president, vice-president, or assistant treasurer, sign all checks, notes, drafts and bills of exchange that it may be necessary and proper to draw or execute in the conduct of the company's business."

Reading from section 7: "He shall with either the president, vice-president, or treasurer, sign all checks, notes, drafts or bills of exchange that it may be necessary and proper to draw or execute in the conduct of the company's business."

(Deposition of Giovanni F. Romeo.)

Counsel for the respective parties then stipulated that the substance of the depositions of Antonio Cipolla, Morris Levenkind and Salvatore Lango, is to the effect that they purchased olives from F. Romeo & Company.

Counsel for plaintiff then continued: "I desire only one sentence of the deposition of Morris Levenkind—that he purchased these olives from F. Romeo & Company as first class olives, A-1 olives,—that question and answer; this is the answer: I will read it.

Q. State what you found as to the condition of those olives?

By the COURT.—What olives?

Mr. FERRARI (Counsel for Plaintiff).—The olives from Romeo & Company.

By the COURT.—What did he buy?

Mr. FERRARI.—He bought certain ripe olives; let me see, he bought certain ripe olives from F. Romeo & Company and the testimony shows that they were [82] from this shipment, or the shipment of the three (3) cars combined, and the answer is this—

By the COURT.—I do not think the answer will be very helpful unless we have the entire deposition on the subject.

Mr. FERRARI.—Well, I think I can read that page.

By the COURT.—He is a witness called for the defendant?

Mr. FERRARI.—Yes, and this is his direct examination.

Deposition of Morris Levenkind, Called for Defendant.

The following excerpts from said deposition were then read into the record by counsel for plaintiff:

Direct Examination.

Q. Mr. Levenkind, what is your address?

A. 104 Moore Street, New York City,

Q. What is your business?

A. Importing of food products.

Q. Have you handled olives? A. Yes.

Q. How many years have you handled olives?

A. Seven or eight years.

Q. Did you during the year 1920 do any business with F. Romeo & Co., Inc.? A. I did.

Q. Did you buy from them any ripe olives?

A. I did.

Q. Of the style known as Lindsay brand?

A. I did.

Q. About what time in 1920, do you know?

A. In May.

Q. State what you found as to the condition of these olives.

By the COURT.—In May, 1920?

Mr. FERRARI.—Yes, your Honor. [83]

The COURT.—That is a year after this transaction.

Mr. FERRARI.—Yes, but the testimony given shows that they are the same olives.

Continuing the Deposition.

A. We bought the olives to be No. 1 goods, and

(Deposition of Morris Levenkind.)

after we took them in the house and shipped them to our customers, we started to get complaints. We soon started to investigate and found that the complaints were in order, as the olives were found to be soft, mushy and unfit for human consumption.

Q. Did you, yourself, make any examination of the olives? A. I did.

Q. What did you do in making the examination?

A. When some of the olives were returned from the customers, I personally cut some of the cans to see for myself if they were really bad and I found them to be really bad.

Q. How many cans did you yourself open and examine of the olives. A. Possibly a dozen.

Q. About how long was this after you had purchased the olives from Romeo & Company?

A. Perhaps three weeks.

Q. Now, will you state just what you found in the olives when you opened the dozen cans—well, about how long a period of time had you been buying ripe olives of this same general style?

A. Six or seven years.

By Mr. GORRILL, Counsel for the Defendant.—
Go back to the middle of the page 6.

Mr. FERRARI.—All right.

A. I found the olives soft, mushy and unfit for human consumption, in my opinion.

Q. In what way were they unfit for human consumption?

(Deposition of Morris Levenkind.)

A. They were deteriorated to such an extent that you couldn't bite them.

Q. Had you ever purchased ripe olives prior to this purchase from [84] Romeo & Company?

A. I did.

Q. Over how long a period of time had you been buying ripe olives of this same general style?

A. Six or seven years.

Q. State whether or not the olives which you purchased at this time from Romeo & Company, to which you testified, were or were not sound olives and in good condition?

A. They were not sound and not in good condition.

Cross-examination.

Q. Are you in business for yourself? A. Yes.

Q. What is the name of the firm?

A. Romeo Importing Company.

Q. What is their business?

A. Importing of food products.

Q. Do you specialize on any particular food products? A. The general line.

Q. What quantity of olives have you handled every year? A. During the year?

Q. During any year; you have testified you have been handling them for seven or eight years.

A. I can't say just the exact amount, but I should think a couple of thousand cases a year.

Q. Ripe olives? A. Ripe olives.

(Deposition of Morris Levenkind.)

Q. When did you buy these olives, the ripe olives from Romeo & Company? A. During May, 1920.

Q. Did you examine the olives when you bought them? A. No. [85]

Q. You bought the olives without examination?

A. Yes.

Q. What quantity of olives did you buy from Romeo & Company? A. One hundred cases.

Q. What disposition have you made of the one hundred cases of olives? A. We sold them.

Q. To your trade?

A. To our trade, and then part of them were returned.

Q. What is the customary trade inspection of olives? A. As to what?

Q. Of olives?

A. The customary inspection of olives?

Q. Yes. A. Cut a can open.

Q. What percentage of the goods bought do you examine? A. Sometimes only one can.

Q. Do you know whether or not there is a customary trade inspection in purchasing olives?

A. Generally is.

Q. Can you say what percentage of the cans are opened in that inspection?

A. I think, if a couple of cases are opened, it would be guide enough to feel that the balance of the lot would be satisfactory.

Q. When you testified you bought one hundred cases

(Deposition of Morris Levenkind.)

of olives from Romeo & Company without examination and shipped them to your trade as A No. 1 olives? A. I did.

Q. They were returned to you about three weeks later?

A. Some of them were returned about three weeks later.

Q. And that was the first examination you made of them? [86] A. Right.

Q. And you discovered they were not up to the quality you bought? A. Yes.

Q. Can you state whether the market price of ripe olives increased or decreased from May, 1919, to January, 1920?

A. I really don't remember without reference to records.

Q. Would you be in a position to answer that question when you come in to sign your testimony to-morrow? A. By looking up my bills, I would.

Q. All right, sir.

After the completion of the reading of the deposition of Morris Levenkind, the following transpired:

Mr. FERRARI, Attorney for Plaintiff.—That is all, your Honor.

Mr. GORRILL, Attorney for Defendant.—But on the next day, on the original here, he evidently added something: Q. Can you now state whether the market price of ripe olives increased or de-

(Deposition of Morris Levenkind.)

creased from May, 1919, to January, 1920?

A. Yes. The market price remained about the same.

The COURT.—Now, I understand that the other two depositions—

Mr. FERRARI.—We will stipulate that the other two depositions are under—are along the same line, and the same substance and effect as the depositions just read.

Mr. GORRILL.—I understand that we will stipulate that the evidence,—the depositions will show, that on the three cars, namely, the two cars that were involved in this draft, and on the third car of May 9th, that on the three cars, there is a loss of \$4,091.24, made up as follows: The advance on the first two cars was \$8,000; the advance on the third car of May 9th, \$5,934.22. The net proceeds of the car of Greek olives was \$2,222.41. The net proceeds on the other two cars, the ripe olives car, was \$7,210.57, making a total net proceeds of \$9,432.98. The total advance of \$15,131.84, less \$1,607.62.

Mr. FERRARI.—It is stipulated that the deposition of Mr. Lodato would show that. [87]

Mr. GORRILL.—Yes, a net loss of—

Mr. FERRARI.—\$4,091.24.

Mr. GORRILL.—Now, if the Court please, for the purpose of the record, is it your understanding, Mr. Ferrari, that the depositions are in or not in, or just that stipulated fact?

(Deposition of Morris Levenkind.)

Mr. FERRARI.—If any of the jurors desire to see them—

The COURT.—I really have in mind future proceedings as to what your record will show.

Mr. FERRARI.—I would stipulate that the depositions could be considered as having been presented.

Mr. GORRILL.—That is satisfactory. That will be the depositions as read, and the deposition of Mr. Lodato.

Mr. FERRARI.—Is that your case? You might, for the purpose of the record, state or name the depositions that are considered read. Mr. Lodato's, it is stipulated that it is the same as Mr. Giovanni Romeo's. And then the deposition of Salvatore Longo, Michael Grasso and M. D. Galanos will be in substance and effect the same as the deposition of Morris Levenkind.

Mr. GORRILL.—And there is also the deposition of Cipollo.

Mr. FERRARI.—That will be to the same effect, will it not?

Mr. GORRILL.—So stipulated; yes.

The COURT.—On the point that the olives were not marketable.

Mr. GORRILL.—And they may be considered as having been read for the purpose of the record and handed to the jury if the jury desires to see them.

Mr. FERRARI.—That is stipulated.

Mr. GORRILL.—That is the defendant's case.

PLAINTIFF'S REBUTTAL.

Mr. FERRARI.—Now, in rebuttal, I desire to read to the jury the back of the contract. I reserved that right:

“TERMS AND CONDITIONS.

Conditions. If the seller should be unable to perform all of his obligations under this contract, by reason of a strike, fire, flood, or other unavoidable casualties beyond his or the control of the packer, such obligations shall terminate and cease. [88]

In case of damage to crops, or for any cause, or causes, whatsoever, the seller is unable to make full delivery of any of the varieties of goods named, the buyer agrees to accept *pro rata* delivery on all goods consigned short.

Goods to be shipped on dates described on the front part of this contract.

Goods are at risk of buyer from and after shipment. No allowance made for loss during transportation—carrier's receipt being vouchers that the goods are received in good order, this contract to be binding upon the seller must be confirmed in writing by F. A. Mennillo, who, however, shall not be responsible for the performance thereof, unless a copy properly signed by the buyer is delivered to the seller within ten days from the date hereof.”

Now, may we proceed to argument, your Honor?

The COURT.—Yes.

Mr. FERRARI.—That is the case for the plaintiff.

Mr. GORRILL.—There are one or two motions that we desire to make. Will your Honor hear them in the presence of the jury?

The COURT.—Yes, I believe so.

Mr. GORRILL.—There was the motion to strike out the testimony of Mr. Lacey, on the ground that it is not within the allegations of the complaint, or within the issues in the case. We also renew the motion for the nonsuit.

The COURT.—I think I shall deny that motion and instruct the jury as to what the issues are.

Mr. GORRILL.—And we will make the motion for a directed verdict in such case.

The COURT.—Denied, and you may have an exception.

Mr. GORRILL.—May we give our grounds for the motion to make the record straight?

The COURT.—If you think it is necessary.

Mr. FERRARI.—We stipulate the same grounds.

Mr. GORRILL.—Well, here are the grounds for the directed verdict: First, that the action is upon an acceptance, and there is no evidence whatever of a written acceptance or of a promise to accept in writing, as required by the [89] provisions of the Civil Code of California.

Second: That if the action is not upon an acceptance, but upon some other sort of contract, the contract also has not been approved, first, be-

cause the promise alleged is a promise to pay, whereas the only promise approved, if any, was a promise to accept; second, it is neither alleged or proved that the or any promise was made to the plaintiff or for defendant's benefit, or, if made to a third person, was transferred by such third person to the plaintiff.

Third: Because it is not proved that the consideration alleged moved to the plaintiff or to any other person at plaintiff's request.

Fourth: It is not proved that there was any consideration for the promise alleged.

Fifth: It is not proved that the promise alleged was made by the defendant for Romeo & Company, Inc., or by anyone with defendant's authority or knowledge, or was ever ratified by this defendant. Also that the action is upon an agreement to accept an instrument—not yet at the time of the promise, in existence. That such promise was not in writing.

As an additional ground for the motion, we make the point that there is neither allegation or proof of any evidence or circumstance that would raise an estoppel upon the defendant to deny acceptance, and promise to accept, or a promise to pay, nor any allegation or proof of any reliance by the plaintiff upon any promise of the defendant, or of any giving of value to the plaintiff by the defendant, or any other change of position by the plaintiff in reliance upon any promise of the defendant.

The COURT.—This motion will be denied. I

will have to say to you gentlemen that the denial of this motion is not to be taken by you as implying what I would do if I were a juror. My function is quite different from what you will perform, and ultimately you will decide the issues on the instructions I give you. I am simply going to submit the issues to you for your determination.

(Statement to the jury by Mr. Ferrari.) [90]

Mr. GORRILL.—You would prefer that I go on, your Honor?

Mr. FERRARI.—It is a hot day. Perhaps it had better go over until two o'clock.

The COURT.—All right, we will adjourn until two o'clock.

(Thereupon a recess was taken until 2 P. M. same day.)

AFTERNOON SESSION.

The CLERK.—The attorneys have prepared a copy of that draft. They searched this noon, but couldn't find the original.

The COURT.—Let it show in the record that this is a copy. You may proceed.

(Thereupon Mr. Gorrill made his argument to the jury, and upon the conclusion of that, Mr. Ferrari made a closing statement.)

Court's Charge to the Jury.

The COURT.—“Gentlemen of the jury, as is true of most of the states in the Union, there is a law in California providing, that to be valid, ac-

ceptance of a draft, such a draft as is involved in this case, must be in writing, signed by the party to be charged. Admittedly here, there is no such writing. To escape the operation or effect of the statute, the plaintiff pleads that the defendant, through its president, F. Romeo, and for the defendant's use and benefit, induced the plaintiff to advance money, that is, to discount or pay the draft at the time it was drawn, by promising orally that it would—pay the draft in full at maturity if the bank would so advance the money, and that being so induced by the defendant, the plaintiff did discount the draft, which it would not have done had it not been for the inducements held out by the president of the defendant. That is the plaintiff's position.

The defendant disputes this contention, and claims that the only agreement was to the effect that it would pay the balance on a contract for the purchase of olives only in case the olives were, upon arrival in New York found upon investigation and inspection, to be up to the standards called for by the contract.

Your first inquiry, therefore, is whether the parties did make, or the defendant did make the absolute promise claimed by the plaintiff, and [91] for the valuable consideration pleaded. Upon that point, the burden is upon the plaintiff to establish its claim by a preponderance of the evidence, that is, evidence which produces conviction in your

minds, not necessarily beyond a reasonable doubt, or by the greater number of witnesses, but by the great weight of the evidence taken as a whole. While you may possibly find that the testimony of no witness, either for the plaintiff or the defendant, is very positive upon just what was said at the bank, that is as to the details of the conversation that took place there, taken altogether, the testimony on the point, such as it is, presents a measure of conflict. Therefore, in order to assist you in determining on which side the truth lies, I have permitted the evidence to take a pretty wide range, thus giving you the situation of the parties, and the circumstances surrounding the transaction which took place at the bank.

Of course, you will also use your reason and the common sense which we all acquire by practical experience and dealings with our fellow men. If the plaintiff was going to pay out over five thousand dollars on this draft, and if as a condition to doing that, it was requiring the defendant to make an absolutely unconditional promise to pay, you may properly ask whether it is or is not probable that it would have taken an oral promise; or would it have required a written acceptance? In balancing the probabilities and improbabilities on this point, you may consider the admitted fact that at the very time the defendant's president was present at the bank, and according to the plaintiff's evidence, was authorized to enter into a formal writ-

ten acceptance: and further,—if you believe the plaintiff's testimony,—that the draft was there, made out, and of course it could have been endorsed was a written acceptance forthwith and without very much trouble. You may also bear in mind the nature of the plaintiff's business and the fact that not only the Statutes of California, but of most states, require acceptances to be in writing, and in the light of this and other circumstances in evidence, say whether the defendants did agree absolutely and unconditionally to pay the amount of the draft. [92]

“And I may add, in this connection, that as a circumstance bearing upon the main question as to just what agreement, if any, was had in the bank, you may not improperly consider just what the plaintiff actually parted with. As I have already explained, the plea is that it was induced by Mr. Romeo to part with a large amount of money, practically five thousand dollars. The evidence as to just how far it changed its position on May 2d, and as to what occurred there is not very specific. The witnesses speak of crediting F. A. Mennillo & Company, but whether or not the bank actually paid out \$5,000, or any other amount, is not definitely shown. If you believe the plaintiff's testimony, it appears that Mennillo & Company was indebted to the bank, and according to the testimony of some of them, it held some of this product, this product, as collateral security, and furthermore

that F. A. Mennillo & Company was a depositor, and it may be important to you to inquire, as bearing upon the general question, as to whether or not the plaintiff bank was in any worse position after the transaction was over with than it was before, whether it paid out any money, or whether it simply credited Mennillo & Company upon the indebtedness due to it, or whether it took the draft for collection in the ordinary way when such paper is deposited by a depositor, crediting his account, with the understanding that if not collected, the account shall then be debited. In that connection, it is proper to call your attention to the fact that the draft bears an endorsement of guaranty by Mennillo & Company." [93]

"If you find that the evidence preponderates in favor of the plaintiff upon this issue, then you should award it the amount of the draft with interest thereon at seven per cent from the maturity of the draft. Am I right as to your legal rate?

Mr. FERRARI.—Yes, seven per cent.

The COURT.—If, on the other hand, you do not find such preponderance in favor of the plaintiff, then you are to find against it in this branch of the case, and consider the view pleaded by the defendants, that is a promise to pay the residue of the contract price as shown by the draft, only when and in case the olives were found to be as called for by the contract, upon their inspection on arrival in New York.

Now, speaking of that branch of the case, the

defendant was bound to accept the olives only if they were up to contract standards. If you find that the understanding was, as testified by Mr. Romeo on the stand, that is, that the olives were to be received in New York and inspected, and the draft to be paid only in case they were found to be up to contract standard, then it was the duty of the defendant upon the arrival of the olives and their receipt in New York to inspect them without unusual delay, and upon inspection, if they found them to be defective, promptly to notify the shipper, F. A. Mennillo & Company.

You have heard the evidence upon what occurred upon the arrival of the olives. Most of it, I think, was in the form of telegram and letters passing between the two parties to the contract. Retention of the shipment for [94] an unreasonable time, without objection or complaint, may be construed as an acceptance at law. But if the purchaser promptly notifies a shipper, he is not bound to return the shipment. So here, if you find that Romeo & Company promptly notified Mennillo & Company of defects in the olives, and of course, if you further find that the olives were not up to contract standard, then it was not the duty of Romeo at New York, either to return the olives to the carrier, that is to the railroad company, or to abandon them. If, as the evidence tends to show, it advised Mennillo & Company of its claim that the olives were defective and not up to contract, and if they were not up to contract, and if defendant further advised that the olives were held subject to the shipper's orders, and

if thereupon Mennillo & Company remained silent or failed to direct what should be done with the olives, the defendant had the right, and it was its duty, to retain the olives and to dispose of them at such prices as were practicable in order to diminish the loss. That is, they were under obligation to make as much of a salvage as possible. There is no contention, as I understand, that the defendant failed in this respect, that is, failed to sell at such prices as were obtainable, or that anything now remains due from the defendant to Mennillo & Company on account of the moneys thus received for the olives. Hence, if upon this branch of the case, unless you find that the olives were up to contract standards, or that notwithstanding their defects, the defendant accepted them and waived the defects, your verdict must be for the defendant." [95]

"I need hardly say to you gentlemen that you are the sole judges of the issues of fact in this case, under the instructions that I have given you, and the responsibility being upon you to find the facts, it is also your right to judge of the credibility of the witnesses and the weight to be given to their testimony. Those matters are exclusively within your province. On the other hand, you should take the principles of law for your guidance as I have explained them to you. As I say, you are the exclusive judges of the issues of fact, and the responsibility is upon you alone, and that notwithstanding any opinion that I may entertain, or you may infer I entertain as to who should succeed in this case. I do not intend to relieve you of your responsibility,

and you are the sole judges of the issues of fact and of the credibility of any and all of the witnesses.

As I have already explained to you, by declination to dismiss the action or take it away from you, is not to be regarded by you as any intimation of what I would do were I in your place. If there is any evidence at all to support a claim, then the issue is for the jury and for the jury to say whether or not the evidence is sufficient to warrant a finding one way or the other. All of you must concur in the finding of a verdict. Two forms of verdict have been prepared. One of them, you will use if you find generally for the defendant. In case you find for the plaintiff, the other has a blank left for the insertion of the amount. You will formally fill in the amount found due, if you so find, and the foreman will sign the verdict. You may retire."

(Jury retires.)

Mr. FERRARI.—May I have an exception to the charge, your Honor?

The COURT.—You may have the exception, but a general exception will be of no avail to you.

Mr. FERRARI.—Well, the only part I object to is the portion with reference to the effect of accepting the oral promise. And also—

The COURT.—The effect of accepting the oral promise? I don't believe [96] I understand what you mean.

Mr. FERRARI.—That portion of the charge that the Court instructed the jury that they should take into consideration the effect of accepting the oral promise—

Mr. TROWBRIDGE.—And we would like to have the record show that the jury has gone out, your Honor.

The COURT.—Of course, they are gone from the box, but are in the corridor and I will have them return if you so desire and permit either side to take exceptions. The jurors are still deemed to be present, and I will recall them if I desire to modify the instructions given.

Mr. TROWBRIDGE.—We have no exceptions, your Honor.

The COURT.—That is all, then.

(Whereupon the jury having considered their verdict, returned into Court, and returned their verdict, finding for the defendants.)

Respectfully submitted,

LOUIS FERRARI,

Attorney for Plaintiff. [97]

Memorandum Opinion.

Touching the instructions to the jury, I have corrected the proposed bill to make it speak truly. The exceptions interpolated in the proposed bill were not in fact taken; that is conceded. Counsel for the plaintiff seeks to justify their insertion now by invoking a statement made from the bench early in the trial that “all adverse rulings would be deemed to be excepted to.” But this was intended only for rulings upon the admission and exclusion of evidence. In such cases the Court’s attention is

called to the particular point of law relied upon by counsel, and after being advised of their views and rulings upon the objection, he grants an exception as of course; hence the mere noting of exceptions is thought to be a formality only, and serves no useful purpose.

But "exceptions" to instructions are more in the nature of objections, and are the only means by which the Court's attention is drawn to the point of law thought by counsel to be material. Especially when, as in this case, instructions are given orally, there may be errors of inadvertence which could very readily be corrected if they were pointed out. It is for that reason that standing rules generally—as in this district and in the Circuit Court of Appeals—require that exceptions to instructions specifically point out the particulars in which it is thought there is error. The statement here relied upon from the bench has been made by the writer in a great number of cases, covering a period of many years, and now for the first time the suggestion is made that it should be regarded as relieving attorneys from the necessity of particularizing their exceptions to instructions. It is difficult to believe that counsel here could have so understood at the time. Such a meaning would imply an intent on the part of the presiding [98] Judge not only to set aside a standing rule of the district, but to transcend a standing rule of the Appellate Court. But it conclusively appears that such was not the understanding at the time. Counsel did not rely upon such a theory, but immediately after the instructions

were given he undertook expressly to take exceptions. Such action would have been wholly unnecessary if the subject was understood to be covered by the statement now relied upon. But even if he had had such an understanding, he was at the time expressly advised that, to be of any avail to him, his exceptions to the instructions must be specific and particular; whereupon there was an attempt at specifications, such as the foregoing record shows. But whether because of the inadequacy of the explanation of counsel or the faulty understanding of the Court, the precise point of the objection or exceptions seems not to have been understood.

In view of these considerations, it is thought that, under Rule 10 of the Circuit Court of Appeals, the instructions might properly be excluded from the bill. But while I think the exceptions are insufficient, in order to avoid multiplicity of procedure in trying out the question, I am making the record show fully and precisely what occurred and shall leave it to the appellate court to determine for itself how far the instructions may be reviewed.

I should add that I overrule defendant's objection that the exceptions, such as they are, were not taken while the jury was still at the bar. The jurors were in the custody of the bailiff, just outside of the courtroom, subject to be recalled, and were held for the very purpose of being recalled should it be found necessary to modify or supplement the instructions as given.

With this explanation, the foregoing is duly settled and allowed as plaintiff's bill of exceptions.

Dated September 10, 1921.

FRANK S. DIETRICH,

District Judge. [99]

Due service and receipt of a copy of the within proposed bill of exceptions is hereby acknowledged this 1st day of July, 1921.

CUSHING & CUSHING,

Attorneys for Defendants.

[Endorsed]: Filed Sept. 12, 1921. Walter B. Maling, Clerk. [100]

In the District Court of the United States in and for the Southern Division of the Northern District of California, Division Two.

No. 16,417.

THE BANK OF ITALY, a Corporation,

Plaintiff,

vs.

F. ROMEO & CO., INC., and F. ROMEO,

Defendants.

Petition for Writ of Error.

To the Honorable, the United States District Court Above Named, and to Honorable FRANK S. DIETRICH, Judge Thereof:

The Bank of Italy, plaintiff in the above-entitled action, feeling itself aggrieved by the verdict of the jury and the judgment rendered against it in the above-entitled cause, on the 21st day of June, 1921, and claiming that in the trial of said cause certain

errors were committed to its prejudice, all of which appear in detail in the assignment of errors filed herewith, comes now, by Louis Ferrari, its attorney, and petitions the said Court for an order allowing the said plaintiff to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and that an order be made fixing the amount of security which the said plaintiff shall give and furnish upon said writ of error; and that upon the giving of such security all further proceedings in the Court be suspended and stayed until the determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit. [101]

And your petitioner will ever pray.

Dated at San Francisco, California, October 5th, 1921.

LOUIS FERRARI,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 5, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [102]

In the District Court of the United States in and for the Southern Division of the Northern District of California, Division Two.

No. 16,417.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC., and F. ROMEO,
Defendants.

Assignment of Errors and Prayer for Reversal.

Bank of Italy, the plaintiff in the above-entitled action, makes and files the following assignment of errors herein to the United States Circuit Court of Appeals for the Ninth Circuit.

The District Court erred in each of the following rulings made by it on the trial of said action:

1. In sustaining the defendants' objection to the following question propounded by the plaintiff to witness T. W. Lacy called for the plaintiff:

“Q. When you say that he (F. Romeo) stated he did not accept the draft when the goods arrived, did he use the word ‘accept’ in the same sense as ‘honor’ is used?”

2. In overruling plaintiff's objection to the admission in evidence of Defendants' Exhibit “A,” being a contract between F. Romeo & Co. and F. A. Mennillo for the purchase of olives.

3. In overruling the objection of plaintiff to the

testimony of F. Mennillo in regard to the contract between Mennillo and F. Romeo & Co.

4. In sustaining defendants' objection to the following [103] question propounded by plaintiff to the witness, F. Romeo:

“Q. You say that Mr. Morse would not have cashed the draft otherwise. You do not think it would have been good banking practice for him to have cashed it if he knew the payment was conditioned upon the arrival of the goods?”

5. In overruling plaintiff's objection to the admission in evidence of the letter dated May 2, 1919, from F. Romeo to F. Romeo Company in New York, and which letter was introduced in evidence as Defendants' Exhibit “B.”

6. In overruling plaintiff's objection to the admissibility of a telegram dated April 29, 1919, from F. Romeo to F. Romeo & Co., which telegram was marked Defendants' Exhibit “C.”

7. In overruling plaintiff's objection to the introduction in evidence of copies of bills of lading which were received in evidence and designated as Defendants' Exhibits “D” and “E.”

8. In overruling plaintiff's objection to the following question propounded by defendant to the witness W. O. Johnson called for the defendant:

“Q. Was there a carload of olives shipped from Lindsay on May 9th, to F. Romeo & Co. by F. A. Mennillo?”

9. In overruling plaintiff's objection to the following question propounded by the defendant to the witness W. O. Johnson:

“Q. If, when olives are supposed to be ready to ship, when they are received by a purchaser they are reddish yellow, are they in good condition?”

10. In overruling plaintiff’s objection to the following question propounded by the defendant to the witness Marie J. Romeo:

“Q. What was the conversation as well as you can remember?”

11. In giving to the jury on the Court’s own motion, [104] the following instruction:

“If the plaintiff was going to pay out over five thousand dollars on this draft, and if as a condition to doing that, it was requiring the defendant to make an absolutely unconditional promise to pay, you may properly ask whether it is or is not probable that it would have taken an oral promise; or would it have required a written acceptance? In balancing the probabilities and improbabilities on this point, you may consider the admitted fact that at the very time the defendant’s president was present at the bank, and *and* according to the plaintiff’s evidence, was authorized to enter into a formal written acceptance; and further,—if you believe the plaintiff’s testimony—that the draft was there, made out, and of course it could have been endorsed with a written acceptance forthwith and without very much trouble. You may also bear in mind the nature of the plaintiff’s business and the fact that not only the Statutes of California, but of most states, require acceptances

to be in writing, and in the light of this and other circumstances in evidence, say whether the defendants did agree absolutely and unconditionally to pay the amount of the draft.”

12. In giving to the jury on the Court's own motion, the following instruction:

“And I may add, in this connection, that as a circumstance bearing upon the main question as to just what agreement, if any, was had in the bank, you may not improperly consider just what the plaintiff actually parted with. As I have already explained, the plea is that it was induced by Mr. Romeo to part with a large amount of money, practically five thousand dollars. The evidence as to just how far it changed its position on May 2d, and as to what occurred there is not very specific. The witnesses speak of crediting F. A. Mennillo & Company, but whether or not the Bank actually paid out \$5,000.00, or any other amount, is not definitely shown. If you believe the plaintiff's testimony, it appears that Mennillo & Company was indebted to the Bank, and according to the testimony of some of them, it held some of this product, this product, as collateral security, and furthermore that F. A. Mennillo & Company was a depositor, and it may be important to you to inquire, as bearing upon the general question, as to whether or not the plaintiff bank was in any worse position after the transaction was over with than it was before, whether it paid out any money, or whether it simply cred-

ited Mennillo & Company upon the indebtedness due to it, or whether it took the draft for collection in the ordinary way when such paper is deposited by a depositor, crediting his account, with the understanding that if not collected, the account shall then be debited. In that connection, it is proper to call your attention to the fact that the draft bears an endorsement of guaranty by Mennillo & Company. [105]

13. In giving to the jury on the Court's own motion the following instruction:

“If you find that the evidence preponderates in favor of the plaintiff upon this issue, then you should award it the amount of the draft with interest thereon at seven per cent from the maturity of the draft. Am I right as to your legal rate?”

Mr. FERRARI.—Yes, seven per cent.

The COURT.—If, on the other hand, you do not find such preponderance in favor of the plaintiff, then you are to find against it in this branch of the case, and consider the view pleaded by the defendants, that is a promise to pay the residue of the contract price as shown by the draft, only when and in case the olives were found to be as called for by the contract, upon their inspection on arrival in New York.

Now, speaking of that branch of the case, the defendant was bound to accept the olives only if they were up to contract standards. If you find that the understanding was, as testified by

Mr. Romeo on the stand, that is, that the olives were to be received in New York and inspected, and the draft to be paid only in case they were found to be up to contract standard, then it was the duty of the defendant upon the arrival of the olives and their receipt in New York to inspect them without unusual delay, and upon inspection, if they found them to be defective, promptly to notify the shipper, F. A. Mennillo & Company.

You have heard the evidence upon what occurred upon the arrival of the olives. Most of it, I think, was in the form of telegrams and letters passing between the two parties to the contract. Retention of the shipment for an unreasonable time, without objection or complaint, may be construed as an acceptance at law. But if the purchaser promptly notifies a shipper, he is not bound to return the shipment. So here, if you find that Romeo & Company promptly notified Mennillo & Company of defects in the olives, and of course, if you further find that the olives were not up to contract standard, then it was not the duty of Romeo at New York, either to return the olives to the carrier, that is to the railroad company, or to abandon them. If, as the evidence tends to show, it advised Mennillo & Company of its claim that the olives were defective and not up to contract, and if they were not up to contract, and if defendant further advised that the olives were held subject to the shipper's orders, and if thereupon Mennillo &

Company remained silent or failed to direct what should be done with the olives, the defendant had the right, and it was its duty, to retain the olives and to dispose of them at such prices as were practicable in order to diminish the loss. That is, they were under obligations to make as much of a salvage as possible. There is no contention, as I understand, that the defendant failed in this respect, that is, failed to sell at such prices as were obtainable, or that anything [106] now remains due from the defendant to Mennillo & Company on account of the moneys thus received for the olives. Hence, if upon this branch of the case, unless you find that the olives were up to contract standards, or that notwithstanding their defects, the defendant accepted them and waived the defects, your verdict must be for the defendant.”

14. In failing to instruct the jury to find in favor of the plaintiff.

15. In entering judgment against the plaintiff on the verdict of the jury.

16. In denying the motion of the plaintiff for a new trial in this action.

WHEREFORE the said plaintiff and plaintiff in error prays that the judgment of said Court be reversed.

LOUIS FERRARI,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 5, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [107]

In the District Court of the United States in and for the Southern Division of the Northern District of California, Division Two.

No. 16,417.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC., and F. ROMEO,
Defendants.

Order Allowing Writ of Error and Fixing Amount of Bond.

The complainant having filed herein and presented herewith a petition for a writ of error and an assignment of errors,—

NOW, THEREFORE, on motion of Louis Ferrari, attorney for the plaintiff, IT IS ORDERED that a writ of error be, and the same is hereby allowed for the review of the judgment and the verdict entered herein on the 21st day of June, 1921, by the United States Circuit Court of Appeals for the Ninth Circuit, and that the amount of the bond on said writ of error be, and the same is, hereby fixed at the sum of \$500—five hundred dollars (\$500), and upon the giving of such bond all further proceedings in this court be suspended, stayed and superseded pending the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: San Francisco, California, October 5th, 1921.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Oct. 5, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [108]

(Bond on Writ of Error.)

KNOW ALL MEN BY THESE PRESENTS, That we, the Bank of Italy, a corporation as principal and London & Lancashire Indemnity Company of America, a corporation organized under the laws of the State of New York, and having its principal place of business in the city of New York, State of New York, as sureties, are held and firmly bound unto F. Romeo & Co., Inc., in the full and just sum of Five Hundred and 00/100 (\$500.00) Dollars, to be paid to the said F. Romeo & Co., Inc., its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of October in the year of our Lord one thousand, nine hundred and twenty-one.

WHEREAS, lately at a District Court of the United States for the Northern District of California (Southern Division) in a suit depending in said court, between The Bank of Italy, a Corporation, Plaintiff, vs. F. Romero & Co., Inc., and F.

Romeo, Defendants, a judgment was rendered against the said plaintiff and the said plaintiff having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said F. Romero & Co., Inc., defendant, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California on the fifth day of November, A. D. 1921.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said The Bank of Italy, a corporation, plaintiff, shall prosecute its said writ of error to effect, and answer all [109] damages and costs if it fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

THE BANK OF ITALY. (Seal)

By A. P. GIANNINI, Pres. (Seal)

LONDON & LANCASHIRE INDEMNITY COMPANY OF AMERICA.

(Seal)

By CHAS. A. PREVOST, (Seal)

Resident Vice-president.

Acknowledged before me the day and year first above written.

Attest: S. H. PERKINS,
Resident Assistant Secretart.

Premium charged for this bond is \$10.00 per annum.

Form of bond and sufficiency of sureties approved.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Oct. 7, 1921. Walter B. Mal-
ing, Clerk. [110]

In the District Court of the United States in and
for the Southern Division of the Northern Dis-
trict of California, Division Two.

No. 16,417.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC., and F. ROMEO,
Defendants.

Praecepta for Record on Writ of Error.

To the Clerk of said Court:

Please prepare transcript on writ of error as fol-
lows:

Complaint.

Answer.

Verdict.

Judgment.

Bill of exceptions.

Petition for writ of error.

Assignment of errors.

Order allowing writ of error.

Bond on writ of error.

Writ of error.

Citation on writ of error.

Motion for new trial.

Order denying new trial.

Opinion of the Court denying motion for new trial.
Opinion of the Court and order settling bill of exceptions.

Dated: October 5th, 1921.

LOUIS FERRARI,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 5, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [111]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,417.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC., et al.,
Defendants.

Order Allowing Withdrawal of Original Exhibits.

IT IS HEREBY ORDERED that the exhibits in the above-entitled cause be and hereby are allowed to be withdrawn from the files of this office and transmitted by the clerk of this court to the United States Circuit Court of Appeals for the Ninth Circuit as a part of the record upon writ of error; said original exhibits to be returned to the files of this court upon the determination of said appeal by said Circuit Court of Appeals.

San Francisco, Cal., November 8, 1921.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed Nov. 8, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [112]

In the Southern Division of the United States Dis-
trict Court, in and for the Northern District of
California, Second Division.

No. 16,417.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC.,
Defendant.

**Certificate of Clerk U. S. District Court to Record
on Writ of Error.**

I, Walter B. Maling, Clerk of the District Court
of the United States, for the Northern District of
California, do hereby certify the foregoing one hun-
dred twelve (112) pages, numbered from 1 to 112,
inclusive, to be full, true and correct copies of the
record and proceedings as enumerated in the prae-
cipe for record on writ of error, as the same remain
on file and of record in the above-entitled cause, in
the office of the clerk of said Court, and that the
same constitute the return to the annexed writ of
error.

I further certify that the cost of the foregoing re-

turn to writ of error is \$49.60; that said amount was paid by the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 22d day of November, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern
District of California. [113]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, To the Honorable, the Judges of the District Court of the United States for the Northern District of California, Southern Division (2d Division) GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between The Bank of Italy, a corporation, plaintiff in error, and F. Romeo & Co., Inc., defendant in error, a manifest error hath happened, to the great damage of the said The Bank of Italy, a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the

Writ of Error. Filed Oct. 8, 1921. Walter B. Mal-
ing, Clerk. [114]

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mentioned is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk of the United States District Court for the
Northern District of California. [115]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to F. Romeo
& Co., Inc., GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, Southern Division (2d Divi-

sion), wherein The Bank of Italy, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 7th day of October, A. D. 1921.

WM. C. VAN FLEET,
United States District Judge. [116]

United States of America,—ss.

On this 7th day of October, in the year of our Lord one thousand nine hundred and twenty-one, personally appeared before me Tobias J. Bricca, the subscriber, and makes oath that he delivered a true copy of the within citation to Mr. Trowbridge, an attorney in the office of Cushing & Cushing, which attorney represents the defendants, F. Romeo & Co., Inc.

TOBIAS J. BRICCA.

Subscribed and sworn to before me at San Francisco, this 7th day of October, A. D. 1921.

[Seal] THOMAS S. BURNES,
Notary Public for the City and County of San Francisco, State of California.

[Endorsed]: No. 16,417. United States District Court for the Northern District of California. The Bank of Italy, a Corp., Plaintiff in Error, vs. F. Romeo & Co., Defendant in Error. Citation on Writ

of Error. Filed Oct. 8, 1921. Walter B. Maling,
Clerk.

[Endorsed]: No. 3804. United States Circuit Court of Appeals for the Ninth Circuit. The Bank of Italy, a Corporation, Plaintiff in Error, vs. F. Romeo & Co., Inc., a Corporation. Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed December 1, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

United States Court of Appeals for the Ninth
Circuit.

THE BANK OF ITALY, a Corporation,
Plaintiff in Error,

vs.

F. ROMEO & CO.,

Defendant in Error.

**Order Extending Time to and Including December
3, 1921, to File Record and Docket Cause.**

Good cause being shown, it is hereby ordered that the plaintiff in error in the above-entitled cause may have to, and including December 3, 1921, within

which to file the record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated November 5, 1921.

HUNT.

Circuit Judge.

[Endorsed:] No. 3804. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including December 3, 1921, to File Record and Docket Cause. Filed Nov. 5, 1921. F. D. Monckton, Clerk. Refiled Dec. 1, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

Case No. 3804.

THE BANK OF ITALY, a Corporation,
Plaintiff in Error,

vs.

F. ROMEO & CO., INC., a Corporation,
Defendant in Error.

Stipulation Concerning Record on Appeal.

WHEREAS, the defendant in error has complained that the record on appeal on file in the above-entitled court and cause is imperfect and incomplete because none of the papers showing the removal of said cause from the Superior Court of the State of California, in and for the City and

County of San Francisco, to the United States District Court, for the Northern District of California, Southern Division, have been set forth in said record on appeal, and also because the minute order dismissing said action in said United States District Court, for the Northern District of California, Southern Division, as to the defendant F. Romeo does not appear in said record on appeal,—

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled cause that the record on appeal shall be deemed to include the following papers and documents:

1. Petition for removal of cause from the Superior Court of the State of California, in and for the City and County of San Francisco, to the United States District Court, for the Northern District of California, Southern Division, filed in said Superior Court on July 9, 1920.

2. Notice of filing petition for removal of cause from the Superior Court of the State of California, in and for the City and County of San Francisco, to the United States District Court, for the Northern District of California, Southern Division, filed in said Superior Court on the 9th day of July, 1920.

3. Bond on removal filed in said Superior Court on the 9th day of July, 1920.

4. Order of the Superior Court of the State of California, in and for the City and County of San Francisco, ordering said cause removed to the United States District Court, for the Northern Dis-

trict of California, Southern Division, filed in said Superior Court on the 9th day of July, 1920.

5. Endorsement on certified transcript of record filed in the United States District Court for the Northern District of California, Southern Division, which transcript consists of copies of the papers numbered 1, 2, 3, and 4 herein, which endorsement shows that the copies of said papers, duly certified by the Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, were filed in the office of the Clerk of the United States District Court for the Northern District of California, Southern Division, on August 6, 1920.

6. Minute order of the United States District Court for the Northern District of California, Southern Division, dated June 21, 1921, dismissing said cause as to the defendant F. Romeo by consent.

IT IS FURTHER STIPULATED AND AGREED that should it become necessary for either party to refer to any or all of said papers, or should the above-entitled court desire to inspect any or all of said papers, that copies thereof, certified by the Clerk of the United States District Court for the Northern District of California, Southern Division, shall be procured and filed in the office of the Clerk of the above-entitled court by the plaintiff in error and may be referred to for all purposes as fully as if said certified copies, and each of them, had been incorporated and set forth at length in the transcript of record now on file in the above-entitled cause.

IT IS FURTHER STIPULATED AND AGREED that neither party to said cause will make any objection on account of the absence of any of said papers from the record on appeal now on file in the above-entitled cause, nor will either party in any way claim that the judgment appealed from is defective or improper by reason of the absence of any of said papers from said record on appeal, or that the above-entitled court has not jurisdiction of said cause or of the appeal from said judgment by reason of the absence of any of said papers from said record on appeal.

Dated: December 28, 1921.

LOUIS FERRARI,

Attorney for Plaintiff in Error.

CHARLES S. CUSHING,

O. K. CUSHING,

WILLIAM H. GORRILL,

DELGER TROWBRIDGE.

Attorneys for Defendant in Error.

Approved:

W. H. HUNT,

U. S. Circuit Judge.

[Endorsed]: Case No. 3804. In the United States Circuit Court of Appeals for the Ninth Circuit. The Bank of Italy, a Corporation, Plaintiff in Error, vs. F. Romeo & Co., Inc., a Corporation, Defendant in Error. Stipulation Concerning Record on Appeal. Filed Jan. 3, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.